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Supreme Court of the United States

OCTOBER TERM, 1952.

No. .....

THE CRUMMER COMPANY, AND R. E. CRUMMER & COMPANY, PETITIONERS,

VS.

JESSIE BALL DUPONT ET AL., AS TRUSTEES, ETC., ET AL., RESPONDENTS.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered on May 2, 1952 (R. 666), which denied review of findings and an order of the United States District Court for the Southern District of Florida transferring an action brought by petitioners in the said district to the United States District Court for the Northern District of Florida, Tallahassee Division.

OPINIONS BELOW.

The findings and order of the District Court (R. 628-643) are unreported.

The opinion of the Court of Appeals (R. 663-665) is reported in 196 F. 2d 468.

JURISDICTION.

The judgment of the Court of Appeals, denying review, was entered on May 2, 1952 (R. 666).

The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254(1).

QUESTIONS PRESENTED.

1. Whether, pursuant to the standards established by this court in *Gulf Oil Corp.* v. *Gilbert*, 330 U. S. 501 (1947), a transfer order purportedly entered under Section 1404(a) of Title 28, U. S. Code, should stand unreversed in the light of the facts[1] that:

(a) petitioners as plaintiffs in this action originally brought suit at their home forum, where they have the vital office facility to sustain the litigation,

(b) the transferor district contains the overwhelming concentration of the defendants and their business affiliates,

(c) besides the defendants, the other witnesses are concentrated in the transferor forum, since that is the principal situs of the subject matter of the action,

(d) the transfer order deprives the plaintiffs of compulsory process to secure attendance, at the trial, of defendants, their agents and employees, and the public officials who participated in the bond refundings involved in the action, and

(e) the conclusions upon which the transfer order rests are without support in the record, and are insufficient to support the said order.

2. Whether an erroneous transfer order under Section 1404(a) of Title 28, U. S. Code, is reviewable before trial, either by appeal or by extraordinary writ, considering the facts that:

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[1]It must be noted here that petitioners are *not* requesting that this Court review the facts, but on the contrary are seeking application of a *correct rule of law* to *undisputed facts.*

(a) if not corrected before trial, the error is absolutely incorrectible,

(b) no decision of the suit on the merits can redress any injury done by the order, and

(c) if not reviewable, the erroneous transfer order may more severely prejudice a plaintiff's case than a judgment of dismissal, which is reviewable.

3. Whether a plaintiff can be forced to defend a counterclaim in the transferee forum, when that counterclaim could not have been brought there as an original action, because of improper venue.

STATUTES INVOLVED.

The pertinent statutory provisions are printed in Appendix "A," *infra*, pp. 29-30.

STATEMENT.

1. The Nature of the Case.

This is an antitrust suit commenced in the Orlando Division of the United States District Court for the Southern District of Florida for $30,000,000 treble damages, of which the plaintiff, The Crummer Company, claims $22,500,000, and the plaintiff, R. E. Crummer & Company, claims $7,500,000 (R. 58). Defendants are the Florida duPont interests and their allies (R. 6, 8, 9) in a conspiracy to dominate the State of Florida and the market in its municipal securities and to destroy the plaintiffs (R. 22-58). These defendants are the trustees of the duPont Trust (three individuals and one corporation), twelve individuals (including two individuals also sued as trustees), and

four corporations, including two municipal bond houses (R. 6, 8, 9).

The plaintiffs were dealers in Florida municipal bonds in interstate commerce (R. 7, 9, 10). R. E. Crummer & Company from 1934 to 1942 was highly successful except for the damage done by the defendants (R. 14-22, 31-34, 57-58), and The Crummer Company, as successor, from 1943 to date would have been similarly successful were it not for defendants' activities (R. 14-58).

The duPont interests, as part of their program to dominate various aspects of commercial and industrial life in Florida (R. 22-57) decided about 1938 to enter the municipal bond field (R. 25-27). Organizing themselves in a series of joint endeavors, beginning in 1938 (R. 25, 28), they and the two municipal bond houses competed in the field of public finance against the plaintiff, R. E. Crummer & Company (R. 25-29). Finding, however, this competition objectionable, they conspired, beginning in 1941, to destroy R. E. Crummer & Company, thus removing its competition (R. 30). After the conspiracy was afoot, R. E. Crummer & Company, for reasons of its own, ceased business, intending to dissolve, and the plaintiff, The Crummer Company, was organized and equipped to fulfill its business position in the field of municipal finance, the change to take place as of January 1, 1943 (R. 20-22). The conspiracy having been originated against R. E. Crummer & Company was enlarged in its purpose to suppress and destroy The Crummer Company in its inception (R. 41-58). The unlawful means included the instigation of federal criminal prosecutions against officers of the plaintiffs (R. 36-38) resulting in indictments which were later dismissed (R. 38-40), interference with the procurement by The Crummer Company of a license to do business in Florida as a dealer in municipal securities (R. 41-44), the instiga-

tion of civil litigation (R. 49-52), and other acts of a predatory nature (R. 30).

The defendants have denied the existence of any such conspiracy (R. 65-224), have denied various specific acts as alleged (R. 65-224), or in the case of admitted acts have asserted the legality thereof (R. 65-224). The defendants Clyde C. Pierce Corporation and Clyde C. Pierce individually have filed a counterclaim against R. E. Crummer & Company alleging that this plaintiff during its business life was itself a monopoly in its Florida operations and dominated or controlled the various local taxing units of the State, especially in their fiscal affairs (R. 362, 540). The duPonts and other defendants have made similar allegation as a defense and have asserted that plaintiffs committed other improper acts in connection with their business (R. 65-224).

2. Location of the Parties.

Both plaintiffs have their only Florida office, and the facilities necessary to sustain this litigation, in the Southern District of Florida (R. 363, 629-630). Eleven individual and four corporate defendants are residents of, and are found in, the Southern District (R. 631-632). One individual and one corporate defendant (Edward Ball and the St. Joe Paper Company) are residents of the Northern District of Florida (R. 631), although both have places of business in the Southern District (R. 363). Service of process upon every defendant except Elbert Dent was made in the Southern District (R. 63).

3. Proceedings in the District Court.

Notwithstanding the facts stated in the preceding paragraph, all but two of the defendants joined in a motion to transfer the cause to the United States District Court

for the Northern District of Florida, Tallahassee Division, under Section 1404(a) of the new Judicial Code (R. 318-320, 629). The motion was argued before the Honorable William J. Barker on November 13, 1950 (R. 464) and over five months later Judge Barker filed findings and an order transferring the case to Tallahassee (R. 628-643).

The Court found *inter alia* that the parties are located as indicated above (p. 6, R. 629, 632); that the principal plaintiff herein is R. E. Crummer & Company, and that since it has been inactive since 1943 and has no Florida resident officers, in effect its convenience need not be considered (R. 630, 631). No finding is made as to the convenience of the plaintiff, The Crummer Company. [R. E. Crummer & Company claims $7,500,000; The Crummer Company, its immediate successor,[1] claims $22,500,000 (R. 58). No finding is made as to the convenience of defendants, or any of them. Although it is arguable that most defendants have impliedly asserted that Tallahassee is more convenient by moving to transfer, these defendants have failed to show, and cannot show, that the trial in a place, which is on the average nearly twice as far (Finding 3, R. 629; Findings 1-4, R. 631, 632; Appendix B) as the transferor forum is more convenient to them. Clearly the court *failed even to consider the convenience*[2] *or "private interest"*[3] *of either plaintiff* even though they brought suit in their home division, the location of their principal, and only Florida office and in the home district of 80% of de-

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[1]In a similar situation, the court held the convenience of an inactive corporation to be the convenience of its successor. *Glasfloss Corp.* v. *Owens-Corning Glass Corp.*, 90 F. Supp. 967 (S. D. N. Y., 1950).

[2]Title 28, U. S. C., Sec. 1404(a).

[3]*Gulf Oil Corp.* v. *Gilbert*, 330 U. S. 501 (1947).

fendants (Findings 1-4, R. 631-632).] The Court also failed to make any finding as to convenience of defendants in moving to Tallahassee for a protracted trial (Findings 1-4, R. 631, 632).

Findings 2, 8 and 9 (R. 633, 634) identify with Tallahassee 45 percent of the overt acts charged and characterize that as the probable locus of most of the witnesses and oral evidence. [These are acts of official nature, matters of public record and common knowledge[1] (Finding 2, R. 633; Compl. pars. 38 (c), (d), R. 32, 33; 39(b)-39(h); 40(b), R. 41-44, 45; 41(a) R. 49). Thus, introduction into evidence will be a mere formality, and the real problem is *proof* of the *motives* of officials, and *motives* and *methods* of defendants (90% of whom reside, or have important offices in, the Southern District) in inducing officials to act wrongfully, and the *effect* upon plaintiffs' previously successful business, which had no significant connection with Tallahassee.]

The court also found that Tallahasse is the location of a great reservoir or pool of records and documents "to which recourse can be had from time to time, and certified

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[1]*e. g.*, Following other devious attacks disguised as official acts (R. 29-44, Compl. Pars. 35-39) defendants induced the Attorney General of Florida to institute quo warranto proceedings against plaintiff, The Crummer Company, unsuccessfully seeking to revoke its permit to transact any business in Florida (R. 44, Compl. 39(h)). The proceedings and the termination in favor of The Crummer Company are matters of public record, *State ex. rel. Watson* v. *The Crummer Company*, 15 So. 2d 441 (1943), susceptible of judicial notice and requiring only the simplest of explanations. *What must be proved* are the *motives* of the then Attorney General (now a resident of Tampa, *Southern District* of Florida) (R. 589), the *methods* and *motives* of defendants in inducing him so to act, and the ruinous *effect* upon plaintiff's business focused upon its Orlando offices.

copies taken from day to day during the hurley-burley (*sic*) of trial" (R. 635-639; Finding 5, 636) [These are public records, certified copies can be obtained with ease and are admissible into evidence without further authentication.[1] There was no denial of plaintiffs' demonstration in open court that the relevant information referred to in the moving papers had, for years, been made available to the public by the State Comptroller by means of printed pamphlets so that such information was already collated and available for introduction into evidence in certified form (R. 592-593). Of course these findings also ignore the planning and the disclosure and winnowing of documentary evidence which will take place at pre-trial conferences; to suggest the necessity of day-to-day access to public records during the hurley-burley of trial is little short of ludicrous. The important records, which cannot be obtained as a matter of course, are to be found in the files of defendants and plaintiffs and these files are located in the Southern District of Florida, either in Orlando, or nearer Orlando than Tallahassee (R. 358, 359, 363, 550, 551, 552, 562, 587). Thus the above findings ignore the convenience of the parties (all of whom can obtain certified copies of any records by mail from Tallahassee), obviously show no convenience to witnesses and cannot be based upon the interest of justice when they form the basis for moving the action away from the district where the non-public records are located. This result is not only contrary to the standards of 1404(a) but also flies in the face of the definitive case on *forum non conveniens, Gulf Oil Corp.* v. *Gilbert*[2]].

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[1]Sec. 92.12, Florida Statutes, 1941, Rule 43, Federal Rules of Civil Procedure (See Appendix A).

[2]330 U. S. 501 (1947); holding "relative ease of access to sources of proof" an important factor in applying the *forum non conveniens* doctrine.

Based upon its erroneous finding that 45% of the overt acts "occurred" in Tallahassee (p. 8, above), the court found that, since neither side had identified by names and addresses any witnesses to be called, most of plaintiffs' witnesses would come from the Northern District [to establish the commission of acts of official character evidenced by public records (R. 640-641).] [Although defendants had not identified any prospective witnesses, except by general references to unnamed government employees, *plaintiffs* had identified *willing* witnesses in the Orlando Division by name and address (R. 358-359) and had identified defendants, their affiliates, and employees, presumably *unwilling* witnesses in the Southern District (R. 367, 577). This "finding" unquestionably ignores the uncontroverted facts before the court when it decided to order the transfer.]

Apparently to balance this erroneous conclusion just discussed, the court also found that the court in the Tallahassee Division has ample powers to compel attendance of *parties* and production of their records *at trial* there, and cites Rules 5, 26, 30 and 36, Federal Rules Civil Procedure (Finding 1, R. 639). [Plainly this finding as to a crucial matter[1] is erroneous as a matter of law. Rules 26, 30 and 36 pertain to *discovery processes* only; Rule 5 makes service on a party's attorney equal to service on the party, but no authority has been cited or found which permits its extension to trial witness subpoenas. Rule 45(e)(1) authorizes such subpoenas to reach any where within the district but only 100 miles from the seat of trial when directed outside the district. All Florida parties, save two (R. 629-

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[1]*Gulf Oil Corp.* v. *Gilbert*, 330 U. S. 501 (1947) holding "the availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing witnesses" as important factors.

632), reside in the Southern District, nearer, and in most cases much nearer, to Orlando than Tallahassee. *All* Florida parties are amenable to trial witness subpoenas issuing from Orlando[1]. Only two can be reached from the Tallahassee Division.[2]

As plaintiffs pointed out in their Controverting Affidavit (R. 362), ten of the twelve taxing units[3] singled out in the Complaint or Answers and Counterclaim of the defendants as being the *loci* of particular overt acts, are much closer to Orlando than Tallahassee (R. 362).

If the refundings which occurred in the counties mentioned in the moving papers[4] are deemed sufficiently relevant to the case to justify serious attention to the public records in Tallahassee, it was proved equally true that the persons and officials who participated in or witnessed the refundings are and will be the *living witnesses* to same (R. 555, 566-569, 571, 603) and that a transfer on the stated theory (records at Tallahassee) defeated its own purpose by moving the case away from the living persons. *Atlantic Coast Line R. Co.* v. *Davis*, 185 F. 2d 766 (5 Cir., 1950).

Thus the trial court has transferred the case away from the residence and all records of 85 percent of the

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[1]R. 629-632; Rule 45 (e) (1), Federal Rules Civil Procedure.

[2]*Ibid.*

[3]A. In the Complaint: Citrus, Pasco, Lee and Sarasota Counties; Panama City.

B. In answers or Counterclaim: Bay, Sarasota, Lee, Manatee, Monroe, Volusia Counties; Avon Park.

[4]Of thirty counties mentioned, twenty-nine are in the Southern District of Florida nearer Orlando than Tallahassee (R. 322, 369, 370).

parties (R. 629-632, 550, 552, 555) away from the residence of all the witnesses so far identified by name and address, and away from the impact of the damage done to plaintiffs. The results are disastrous to plaintiffs; it virtually eliminates compulsory process for bringing unwilling witnesses to trial. In *Gulf Oil Corp.* v. *Gilbert*, 330 U. S. 501, 511 (1947), Mr. Justice Jackson wrote:

> "Certainly to fix the place of trial at a point where litigants cannot compel personal attendance and may be forced to try their cases on deposition, is to create a condition not satisfactory to court, jury or most litigants."

(See pp. 10-11, above.) It requires a complete relocation of plaintiffs and their attorneys; and it will require each party to travel an average of 196 miles more for each round trip to Tallahassee than if trial were had at Orlando.[1] The findings of the court, rather than demonstrating the convenience of parties and witnesses served by the transfer, only demonstrate a vast increase in inconvenience and expense to parties and witnesses, and fly full in the face of the statute authorizing transfers in proper cases.[2]

The lower court found that the combined dockets in the Orlando and Tampa Divisions[3] were much heavier than all the combined dockets of all the divisions in the Northern District, that a speedier trial would be possible in Tallahassee than in Orlando, and that the transfer would cause less postponement of other cases (R. 641-642). [Neither the *forum non conveniens* doctrine nor

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[1]See Appendix B.

[2]Title 28 U. S. C., Sec. 1404(a). (See Appendix A.)

[3]Judge Barker's own statement shows that the great concentration of cases is at Tampa (R. 604).

its statutory counterpart, Sec. 1404(a), contemplate consideration of the condition of the docket where venue is properly laid at a place with *some* connection with the subject matter of the suit.[1] As Judge Irving Kaufman pointed out in denying a motion to transfer an antitrust action:

> "Because of the generally recognized congested calendar conditions existing in this district, practically all applications under Section 1404(a) would have to be granted, were this consideration to receive *major recognition* by the Court."[2]

During the hearing on this very motion, Judge Barker said that a judge from the Southern District could sit in the Northern District while Judge DeVane[3] tried this case at Tallahassee (R. 607). Clearly, then, this "crowded docket" factor does not hinge upon a shortage in *judicial manpower*. It is merely a problem of finding a *courtroom* that will be free long enough to try this case. Plaintiffs asserted, *without dispute*, that the Orlando docket was current—that is, pending cases were set for trial as soon as counsel were ready (R. 604). Although both judge and courtroom are available for trial in Orlando (R. 604), in the home district of 85% of the parties, the judge has transferred the case to Tallahassee. The result is analagous to a game of musical chairs; plaintiffs move to Tallahassee, Judge DeVane, with an annual assignment for the Southern District, sits still in Tallahassee; defendants move from Jacksonville, Tampa, Lakeland, Orlando, St. Petersburg to

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[1]See Appendix C for a comparison of cases.

[2]*United States* v. *Scott and Williams*, 88 F. Supp. 531, 535 (S. D. N. Y., 1950) (Emphasis added).

[3]*Each year* Judge DeVane is also assigned *for that year* to the Southern District by the Chief Judge of the Fifth Circuit, pursuant to 28 U. S. C., Sec. 292(b).

Tallahassee; a Southern District Judge, assigned to Tampa and Orlando, or Miami, moves to Pensacola, Marianna or Gainesville to sit for Judge DeVane, who is expected to sit in both districts.

Further, the language in the court's finding in regard to speedy trial at Tallahassee (R. 641, 642) loses much of its effect in light of the fact that this action was commenced December 19, 1949, and is still in the pre-trial stage. When the pleadings are settled and the end of extensive discovery proceedings is in sight, the case can be set for trial to come up as soon as defendants desire.

4. Proceedings Seeking Review.

The plaintiffs sought a review by the Court of Appeals for the Fifth Circuit by way of a motion for leave to file a petition for mandamus, or other relief[1], but this motion was denied without opinion on April 25, 1951. This entire appellate transaction, including filing of the papers, hearing and denial of the motion, was completed in *less than one hour,* in spite of the complicated nature of the case.

To the present time, *petitioners have never had an appellate hearing to review Judge Barker's order* unless it be the few minutes expended before denial of leave to file for mandamus.

After leave to file was denied, the plaintiffs, seeking all possible remedies in the Court of Appeals, perfected an appeal in that court under Docket No. 13702, their contention being that Judge Barker's entry of the transfer order represented a final disposition of a claimed right which is not an ingredient of the cause of action and does not require consideration with it, and is therefore separ-

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[1]Record on previous petition for certiorari, October Term, 1951, No. 323, pages a.-k.

ately appealable. *Cohen* v. *Beneficial Loan Corporation*, 337 U. S. 541 (1949); *Swift and Co.* v. *Compania Caribe*, 339 U. S. 684 (1950); *Stack* v. *Boyle*, 342 U. S. 25 (1951). Plaintiff-appellants further contended that the appeal could be treated as an application for such extraordinary relief as might be proper for the purpose of setting the transfer order aside. *Magnetic Engineering Co.* v. *Dings*, 178 F. 2d 866 (2 Cir., 1950); *Nicol* v. *Koscinski*, 188 F. 2d 537 (6 Cir., 1951).

While this appeal was pending, plaintiffs brought the order of the Fifth Circuit denying mandamus before this Court by petition for certiorari, and moved this Court to defer consideration of the petition until the appeal was disposed of by the Fifth Circuit. Certiorari was, however, denied on December 11, 1951.

After argument, the Fifth Circuit dismissed the appeal and denied plaintiffs any relief whatever by its order entered on May 2, 1952 (R. 666). In its opinion, the Court stated that the transfer order was not appealable. Regarding treatment of the appeal as a petition for extraordinary relief, the Court made no direct mention of it, but stated in connection with the previous application for mandamus, which was denied on April 24, 1951:

> "After oral argument and upon full consideration of the proceedings below, this Court entered its order denying the motion for leave to file a petition for writ of mandamus. Implicit in this order is the finding that the District Judge did not abuse his discretion" (R. 665).

The above-quoted language is the first suggestion your petitioners have received that the previous order of the Fifth Circuit was intended to represent an adjudication on the merits, or a complete sanction of the findings, con-

clusions and order of the District Court. Even if the previous order was so intended, however, petitioners respectfully submit that the original denial of mandamus was no bar to granting relief on the later application, under *Roberts* v. *United States District Court*, 339 U. S. 844 (1950).

In all of the proceedings described above, it has never been disclosed to petitioners what rule of law was applied, either by the District Court or the Court of Appeals. Petitioners earnestly submit that no correct rule of law could have been applied to jusify the result acheived in this case.

SPECIFICATION OF ERRORS TO BE URGED.

The Court of Appeals erred:

1. In sanctioning the transfer order of the District Judge, although it was based upon wholly inadequate grounds and constituted an abuse of discretion amounting to a usurpation of power.

2. In dismissing plaintiffs' appeal, or, in the alternative, in failing to consider the appeal as an application for extraordinary relief and grant same.

3. In denying plaintiffs any relief whatever.

REASONS FOR GRANTING THE WRIT AND BRIEF IN SUPPORT OF PETITION.

1. The decision of the Court of Appeals below, in sanctioning an order of the District Court construing 28 U. S. C., Section 1404(a), so as to repudiate the forum non conveniens doctrine, is believed to have decided an important question of federal law which has not been, but should be settled by this court.

The new Judicial Code became effective on September 1, 1948. Section 1404(a) of the Code, a wholly new provision, authorized a change of venue "(f)or the convenience of parties and witnesses, in the interest of justice * * *" So broad is this language that the Reviser's Notes assume a peculiar importance in its interpretation, as this Court has already found in *Ex parte Collett*, 337 U. S. 55 (1949). Turning to these notes, we learn that Section 1404(a) was "drafted in accordance with the doctrine of *forum non conveniens* * * *," a doctrine for which there had previously been no federal statutory basis. We learn further that *Baltimore & Ohio R. Co.* v. *Kepner*, 314 U. S. 44 (1941), represents an example of the need for this provision of the Code. Consulting this case, we find that plaintiff's choice of forum there was actually vexatious. Finally, the Reviser avers: "The new subsection requires the court to determine that the transfer is *necessary* for convenience of the parties and witnesses, and further, that it is in the interest of justice to do so" (Italics added).

Nothing in the Reviser's Notes indicates an intention of departing from the *forum non conveniens* doctrine. On the contrary, everything points to a desire to incorporate this doctrine, heretofore wholly judicial, into the Code.

In searching for the mechanics of this doctrine as it existed when the Code was drafted, we are led to *Gulf Oil Corp.* v. *Gilbert*, 330 U. S. 501 (1947) which laid down the following considerations for the court in applying the doctrine (330 U. S. 501, 508, 511):

(a) The "private interest of the litigant";

(b) "The relative ease of access to sources of proof";

(c) "availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses";

(d) "possibility of view of premises, if view would be appropriate to the action"; and

(e) all other practical problems that make trial of a case easy, expeditious and inexpensive."

Most significantly, the Court concluded this section of its opinion with the words:

> "But unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed."

The foregoing, it is earnestly submitted, represents the whole basic framework of law upon which a transfer order under Section 1404(a) must be built. In the present case, had the *Gulf* standards been applied, no transfer order could have resulted. These standards were not applied, however, because the District Judge was erroneously convinced that they did not govern the practice in the Fifth Circuit (R. 478, 517, 527, 611, 617).

The present case, grievous as the result has been to petitioners, is merely symptomatic of a much larger problem, of great importance in the administration of the new Judicial Code. Section 1404(a) has been in constant use

since its inception. As demonstrated in Appendix D, no less than 108 reported contested cases dealing with this section have been decided by the district courts. As to the interpretation of the statute, however, the cases are in hopeless confusion, and are capable of reasonable classification only into two groups: those which apply the *forum non conveniens* doctrine as recapitulated in the *Gilbert* case (Appendix E), and those which reject *forum non conveniens*, but fail to replace it with any comprehensible standards (Appendix F). This basic conflict in principle is summed up in *Wiren* v. *Laws*, (D. C. Cir., 1951) 194 F. 2d 873, following *forum non conveniens* and emphasizing particularly the presumption in favor of plaintiff's choice of forum, and *All States Freight, Inc.*, v. *Modarelli*, (3 Cir., May 8, 1952) ..... F. 2d ....., expressly repudiating *forum non conveniens* and the *Gilbert* case.

The situation is aggravated by the wording of the statute itself, since the broad sweep of its language "in the interest of justice" is the ultimate generalization known to the law and leaves room for all types of contradictory and unpredictable results. If, as petitioners contend, the statute imposes the principles of the common law doctrine, the standards are reasonably well known and may be taken into account by the plaintiff when he files his suit, allowing him to select his forum with reasonable assurance of the consequences of his selection. On the other hand, if transfer be regarded as so much less drastic than dismissal as of old that completely new standards are indicated, then these new standards ought in the interest of judicial administration to be defined for the guidance of the trial courts.

2. The decision of the Court of Appeals below, in denying petitioners any review on the merits, has decided an important question of federal law which has not been, but should be settled by this court.

The Court of Appeals below rejected plaintiffs' contention that the transfer order should be held appealable under the rule of *Cohen* v. *Beneficial Industrial Loan Corporation*, 337 U. S. 541 (1949). In that case, an order denying defendant's motion to require the plaintiff to furnish security was held appealable before final judgment, because it was "a final disposition of a claimed right which is not an ingredient of the cause of action and does not require consideration with it." Jackson, J. (pp. 546-547). In *Swift & Co.* v. *Compania Colombiana del Caribe*, 339 U. S. 684 (1950), this Court reaffirmed the Cohen doctrine, applying it to an order vacating an attachment and based primarily upon the doctrine of *forum non conveniens*.

A very recent application of the *Cohen* doctrine by this Court is found in *Stack* v. *Boyle*, 342 U. S. 25 (1951), 96 L. Ed. 7, where a denial of a motion to reduce excessive bail was held to be appealable under 28 U. S. C., Sec. 1291, and the *Cohen* case. In a separate opinion, concurring on this point and joined by Mr. Justice Frankfurter, Mr. Justice Jackson pointed out (96 L. Ed., at p. 14) that it is a final *decision* that Congress has made reviewable under Sec. 1291, as distinguished from a final judgment. He went on to state (96 L. Ed., at p. 14):

> "While a final judgment always is a final decision, there are instances in which a final decision is not a final judgment. The purpose of the finality requirement is to avoid piecemeal disposition of the basic controversy in a single case 'where the result of review will be "to halt in the orderly progress of a cause and consider incidentally a question which has happened to

cross the path of such litigation * * *" ' *Cobbledick* v. *United States*, 309 U. S. 323, 326, 84 L. Ed. 783, 785, 60 S. Ct. 540. *But an order fixing bail can be reviewed without halting the main trial—its issues are entirely independent of the issues to be tried—and unless it can be reviewed before sentence, it never can be reviewed at all.* The relation of an order fixing bail to final judgment in a criminal case is analogous to an order determining the right to security in a civil proceeding, *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U. S. 541, 93 L. Ed. 1528, 69 S. Ct. 1221, or other interlocutory orders reviewable under 28 U. S. C., Sec. 1292. I would hold, therefore, that such orders are appealable" (Italics added).

Every consideration mentioned by Mr. Justice Jackson is apposite here, and some with stronger reason. The transfer order is a final *decision*, which can be reviewed without halting trial,[1] its issues are independent of the main case, and if not reviewed before *trial*, rather than before *judgment*, it can never be reviewed at all.

While this Court has thus been reaffirming and extending the *Cohen* doctrine, four Courts of Appeals have specifically rejected it as inapplicable to transfer orders: *Ford Motor Co.* v. *Ryan*, 182 F. 2d 329, 330 (2 Cir., 1950); *Paramount Pictures* v. *Rodney*, 186 F. 2d 111, 112 (3 Cir., 1951); *Shapiro* v. *Bonanza Hotel Co.*, 185 F. 2d 777, 779 (9 Cir., 1950); *Clinton Foods* v. *United States*, 188 F. 2d 289, 292 (4 Cir., 1951). In not one of these cases is there a single shred of analysis, or any consideration of the later *Cohen* doctrine cases.

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[1]Motions for transfer, of their nature, usually are made and disposed of early in the litigation. As an example, the present case is still in its discovery phase, although the present uncertain state of the reviewability of orders under Sec. 1404(a) has prolonged the period of seeking review far beyond normal.

As an alternative, plaintiffs urged the Fifth Circuit to treat the appeal as a petition for extraordinary relief, and consider the merits, in accordance with *Magnetic Engineering and Mfg. Co.* v. *Dings*, 178 F. 2d 866 (2 Cir., 1950), and *Shapiro* v. *Bonanza Hotel Co.*, 185 F. 2d 777 (9 Cir., 1950). This the Fifth Circuit declined to do, and the only suggestion of a reason is contained in one sentence of its opinion where it states, referring to its previous order denying plaintiffs' motion for leave to file a petition for mandamus:

> "Implicit in this order is the finding that the District Judge did not abuse his discretion."

But this statement is certainly error, since the mere denial of a motion for leave to file a petition for mandamus does not prejudice petitioner's right to seek the same relief at a later time. *Roberts* v. *U. S. District Court*, 339 U. S. 844 (1950).

Plainly, petitioners have had no review, or color of review, on the merits of the transfer order, and the Fifth Circuit has therefore held that an erroneous transfer is not reviewable at all. This ruling presents defendants in any type of federal litigation with a new and powerful affirmative weapon to which there can be no defense. No matter how carefully he selects his forum, or how much attention he gives to the convenience of all concerned in the litigation, a plaintiff has no assurance that he will not be the victim of an arbitrary order of transfer to a forum having no contact with his case, and where he cannot attempt to enforce his rights with any hope of success. Further, when a plaintiff selects a forum, he exposes himself to any counterclaim which can be brought against him, and waives any objection he might otherwise have to venue on that counterclaim, *General Electric Co.* v. *Marvel Rare Metals Co.*, 287 U. S. 430 (1932). But under an unsupervised Sec-

tion 1404(a), a statute intended to protect defendants from vexatious forums, these same defendants may now effectuate a transfer of the entire action, including counterclaims, to a forum vexatious to the plaintiff and force him to make his defense there, thus completely reversing the plain policy of the statute. This is precisely what has happened in the present case, the plaintiff R. E. Crummer & Company being faced with a counterclaim seeking $6,000,000 in damages (R. 362, 540), which is now asserted against it in a district not available to the counterclaimants but for the erroneous transfer order which has been denied review.

At the hearing on the new Judicial Code before Sub-Committee No. 1 of the House Judiciary Committee, Professor James W. Moore, author of Moore's Federal Practice and a consultant on the Code, stated that Sections 1404 and 1406 were changes "in line with modern state practice." United States Code Congressional Service, *New Title 28, United States Code,* (1948), page 1969. This Court has already referred to state practice as helpful in interpreting Section 1404(a).[1]

An examination of nineteen state statutes and the similarity of those statutes to each other and in turn to the language of 1404(a) leaves no doubt that the draftsmen did in fact refer to those state statutes. Fourteen of the nineteen states authorize a change of venue in the following verbatim language:

> "The convenience of witnesses and the ends of justice would be promoted by the change."

Four others are almost identical (See Appendix G).

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[1]*Ex parte Collett,* 337 U. S. 55, 60, N. 10 (1949).

Furthermore, our investigation of this modern state practice shows that in each case the state has so controlled the operation of its statute that an order made thereunder is either (1) an interlocutory appealable order, or (2) established practice makes such an order reviewable by mandamus or other extraordinary writ. Illustrative decisions are set forth in Appendix G. Thus a federal statute passed by Congress upon the express representation that it was to follow the state statutes as interpreted by the court should be given a similar construction and some means of review be provided.

We believe that the previous experience of other jurisdictions in this field has led them to conclude that it is judicially and administratively unsound to permit indiscriminate disturbance of statutory venue without some reasonable surveillance by appellate courts. This is doubly true during the early periods following enactment of a transfer statute before standards for determining a transfer motion on the merits have been settled authoritatively. The matter is all the more intolerable in the federal courts. With federal forums provided in every one of our states and territories, some of them thousands of miles distant from others, the ultimate place of trial may well be the decisive factor as to whether or not any particular lawsuit should be brought at all.

Finally, every United States Court of Appeals which has considered the subject has held that some form of review is available, with the exception of the Fifth Circuit, in the present case, and the Third Circuit in *All States Freight, Inc.*, v. *Modarelli*, ____ F. 2d ____ (1952).

Petitioners earnestly contend that while appeal, under the *Cohen* doctrine as extended, is the preferable method of review, since it eliminates the objections to extraordi-

nary writs outlined in *Ex parte Fahey*, 332 U. S. 258 (1947), the more important question is whether review is available at all, and the answer can only be in the affirmative.

3. The decision of the Court of Appeals below in sanctioning an order rejecting forum non conveniens and according it no review on the merits, is believed to conflict in principle with the decision of the Court of Appeals for the District of Columbia in Wiren v. Laws, 194 F. 2d 873 (Dec. 27, 1951).

In *Wiren* v. *Laws*, 194 F. 2d 873 (D. C. Cir., 1951), an erroneous transfer order was set aside by mandamus. The Court adhered to the principles of *Gulf Oil* v. *Gilbert, supra,* and on this point also cited and quoted from *Ford Motor Co.* v. *Ryan*, 182 F. 2d 329 (2 Cir., 1950), particularly emphasizing the weight to be given the plaintiff's choice of forum. Further, in holding that mandamus was appropriate, the Court in the *Wire* case stated:

> "If we were to hold even unauthorized orders of transfer to be beyond our control, the effect would be to deprive litigants of forums to which they are entitled." *Bazelon, C. J.*, 194 F. 2d 873, 874.

On these two points, *i. e.*, the applicability of *forum non conveniens* and the reviewability of an erroneous transfer order, the Fifth Circuit in the present case was directly opposed to the *Wiren* case, but was in direct accord, in principle, with the case of *Modarelli* v. *All States Freight, Inc.*, ____ F. 2d ____ (3 Cir., May 8, 1952).

The *Modarelli* case specifically rejects *forum non conveniens* as expressed in *Gulf* v. *Gilbert, supra,* and in *Koster* v. *Lumbermen's Mutual Casualty Co.*, 330 U. S. 518 (1947), after stating that "some district judges are applying Section 1404(a) with a limitation imposed by the Supreme Court upon the doctrine of *forum non conveniens* as

found in" the *Gulf and Koster* cases. A comparison of Appendices E and F, infra, pp. 45 and 49, demonstrates that far more district courts have applied *forum non conveniens* under 1404(a) than not, and that the recent trend in the district courts is overwhelmingly in favor of the doctrine.

On the second point, the Third Circuit in the *Modarelli* case held that a transfer order is absolutely non-reviewable so long as the district judge has *considered* the "interests stipulated in the statute and decided thereon." In support of this holding, the Court states:

> "Every litigant against whom the transfer issue is decided naturally thinks the judge was wrong. It is likely that in some cases an appellate court would think so, too. But the risk of a party being injured either by the granting or refusal of a transfer order is, we think, much less than the certainty of harm through delay and additional expense if these orders are to be subjected to interlocutory review by mandamus." Goodrich, C. J.

Later in its opinion, the court definitely recognizes a conflict between the circuits on the issue of reviewability,[1] stating:

> "We realize that the view we express is not the one which some of our judicial brethren are following

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[1]After observing that it is possible to obtain review in the Second Circuit, but impossible in the Third under the *Modarelli* case and *Gulf Research* v. *Leahy*, 193 F. 2d 302 (1952), *cert. granted* 20 U. S. L. Week 3273, a writer recently stated:

> "Unless the Supreme Court in the cases now before it rules on these and appealability questions involving transfer orders, we will have a situation where a lawyer in one circuit can have the order reviewed by writ, while a lawyer in another circuit cannot." Keefe, *Venue and Removal Jokers in the New Federal Judicial Code*, 38 Va. L. Rev. 569, 574-575 (1952).

with regard to this statute" (Citing, among others, *Wiren* v. *Laws, supra,* 194 F. 2d 873 (D. C. Cir., 1951)).

The principle of the *Modarelli* case, identical with the holding of the Fifth Circuit in the present case, and in accord with the previous holding of the Third Circuit in *Gulf Research & Development Co.* v. *Leahy,* 193 F. 2d 302 (1952); *cert. granted* 20 U. S. L. Week 3273 (U. S., April 22, 1952), gives the district courts carte blanche to decline jurisdiction of cases at will, so long as they pay lip service to the "convenience of parties and witnesses, in the interest of justice," a vague, formless and indeterminate series of words. This is an abdication of appellate supervision which can enable a district judge to present defendants with a complete defense by transferring the action to a venue where the plaintiff cannot afford to litigate, leaving the plaintiff with no recourse in the courts no matter how meritorious his case may be. The Third Circuit suggests that it will save time to let these errors remain forever uncorrected. The principal expenditure of time by litigants under the statute to date has been caused by the uncertain and confusing state of the law to which petitioners have referred, and which petitioners here seek to have clarified.

Petitioners therefore respectfully submit that the *Wiren* case is correct in principle and that both the present decision of the Fifth Circuit and the *Modarelli* case, with which it is in accord, are wrong and should be set aside.

CONCLUSION.

For the foregoing reasons, this Court should exercise its power to issue a writ of certiorari or to grant petitioners such other relief as may be just and proper in the premises, with a view to settling the important questions presented and correcting the manifest error inherent in the transfer which necessitated these proceedings.

Respectfully submitted,

ROBERT J. PLEUS,
CHRIS DIXIE,
JOSEPH P. LEA, JR.,
Counsel for Petitioners.

APPENDIX A.

1. Title 28, U. S. C., Sec. 1404(a):

Change of Venue.

"For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought."

2. Title 15, U. S. C., Sec. 15:

Suits by persons injured; amount of recovery.

"Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit; including a reasonable attorney's fee (Oct. 15, 1914, Ch. 323, Sec. 4, 38 Stat. 731)."

3. Title 15, U. S. C., Sec. 22:

District in which to sue corporation.

"Any suit, action, or proceeding under the antitrust laws against a corporation may be brought not only in the judicial district whereof it is an inhabitant, but also in any district wherein it may be found or transacts business; and all process in such cases may be served in the district of which it is an inhabitant, or wherever it may be found. (Oct. 15, 1941, Ch. 323, Sec. 12, 38 Stat. 736)."

4. Section 92.12, Florida Statutes, 1951:

Copies of evidence of records of public officers in gen-

"In all cases where *any record,* pleading, document, deed, conveyance, paper or instrument of writing is, or may be, required or authorized to be made or *filed or recorded in any public office* of this state or of any county thereof, *a copy thereof, duly certified* under the hand and seal of office (if there be seal of office, and if there be no seal of office, then under the private seal of the officer having the custody or control of the same), to be a true and correct copy of the original, on file or of record in his office, *shall in all cases* and in all courts and places *be admitted and received in evidence* with the like force and effect *as the original thereof might be.* Nothing herein contained shall be so construed as to prevent any court or judge before whom such copies may be offered in evidence from requiring the party offering the same to produce or account for the original of such copy, if the same shall be deemed necessary or proper for the attainment of justice" (Emphasis added).

5. Rule 43, Federal Rules of Civil Procedure:

Evidence.

"43.(a) *Form and Admissibility.* In all trials the testimony of witnesses shall be taken orally in open court, unless otherwise provided by these rules. All evidence shall be admitted which is admissible under the statutes of the United States, or the rules of evidence heretofore applied in the courts of the United States, or under the rules of evidence heretofore applied in the courts of the United States on the hearing of suits in equity, *or under the rules of evidence applied in the courts of general jurisdiction of the state in which the United States court is held. In any case, the statute or rule which favors the reception of evidence governs* and the evidence shall be presented according to the most convenient method prescribed in any of the statutes or rules to which reference is herein made. The competency of a witness to testify shall be determined in like manner" (Emphasis added).

APPENDIX B.

(A) Parties	(B) Residence	(C) Distance to Orlando	(D) Distance to Tallahassee	(E) Additional Distance Round Trip to Tallahassee	(F) Amenable to Trial Witness Subpoena from Orlando	(G) Amenable to Trial Witness Subpoena from Tallahassee
Plaintiffs						
R. E. Crummer & Co.	Orlando-S[1]	0	252	504	Yes	No
The Crummer Company	Orlando-S	0	252	504	Yes	No
Defendants						
Loomis C. Leedy	Orlando-S	0	252	504	Yes	No
Leedy, Wheeler & Alleman, Inc.	Orlando-S	0	252	504	Yes	No
Paul L. Pierce	Orlando-S	0	252	504	Yes	No
Howard S. Wheeler	Orlando-S	0	252	504	Yes	No
W. Wallace Shafer	Lakeland-S	63	253	380	Yes	No
Walter R. Gall	Zephyrhills-S	79	234	310	Yes	No
Walter P. Fuller	St. Petersburg-S	117	261	288	Yes	No
Ernest J. Mansfield	St. Petersburg-S	117	261	288	Yes	No
Archie Clement	Tarpon Springs-S	129	225	192	Yes	No
Cummer Sons Cypress Company	Jacksonville-S	148	169	42	Yes	No
Jessie Ball duPont[2]	Jacksonville-S	148	169	42	Yes	No
Fla. Nat'l Bank, Jax.	Jacksonville-S	148	169	42	Yes	No
Roger L. Main	Jacksonville-S	148	169	42	Yes	No
Clyde C. Pierce	Jacksonville-S	148	169	42	Yes	No
Clyde C. Pierce Corp.	Jacksonville-S	148	169	42	Yes	No
Edward Ball[2]	Tallahassee[3]-N	252	0	—504	Yes	Yes
St. Joe Paper Co.	Port St. Joe[4]-N	351	99	—504	Yes	Yes
				4734		
				—1008		
Total Round Trip Differential All Florida Parties				3734		

Average Additional Round Trip Milage to Tallahassee for Each Party ____ 196
Average Round Trip for Defendants to Tallahassee ____ 394
Average Round Trip for Defendants to Orlando ____ 234

WITNESSES IDENTIFIED BY NAME[5]

W. J. Noel	Orlando-S	0	252	504	Yes	No
E. L. Mickle	Orlando-S	0	252	504	Yes	No
J. P. Lea, Jr.	Orlando-S	0	252	504	Yes	No
W. J. Meredith	Orlando-S	0	252	504	Yes	No
H. A. Lasseter	Kissimmee-S	18	270	504	Yes	No
Edward Ball	Tallahassee-N	252[2]	0	—504	Yes	Yes
Clyde C. Pierce	Jacksonville-S	148	169	42	Yes	No
Frank Taylor	Jacksonville-S	148	169	42	Yes	No

[1]Letters "S" and "N" indicate respectively Southern and Northern Districts of Florida.

[2]Sued individually and as Trustee of the Alfred I. duPont Testamentary Trust, which is domiciled at Jacksonville.

[3]Business address, attorneys, and office at Barnett National Bank Building, Jacksonville.

[4]Principal Officers, Offices, Resident Agent, and records at Jacksonville (R. 587).

[5](R. 358-359; 367, 577.)

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APPENDIX C.

I. The following cases hold that the condition of the docket should be given little or no consideration in a motion to transfer under 28 U. S. C. 1404 (a):

United States v. *National City Lines*, 80 Fed. Supp. 734, 743 (S. D. Cal., 1948).

Brown v. *Insurograph*, 85 Fed. Supp. 328, 329 (D. Del., 1949).

Naughton v. *Pennsylvania Ry.*, 85 Fed. Supp. 761, 762 (E. D. Pa., 1949).

Barnhart v. *John B. Rogers Producing Co.*, 86 Fed. Supp. 598, 599 (S. D. N. Y., 1950).

United States v. *Scott & Williams, Inc.*, 88 Fed. Supp. 531, 535 (S. D. N. Y., 1950).

Keller-Dorian Colorfilm Corp. v. *Eastman Kodak*, 88 Fed. Supp. 863, 866 (S. D. N. Y., 1949).

Ferguson v. *Ford Motor Co.*, 89 Fed. Supp. 45, 55 (S. D. N. Y., 1950).

Glasfloss Corp. v. *Owens-Corning Fiberglas Corp.*, 90 Fed. Supp. 967, 969, 970 (S. D. N. Y., 1950).

Automatic Washer Co. v. *Easy Washing Machine Corp.*, 91 Fed. Supp. 894, 895 (N. D. N. Y., 1950).

Henderson v. *American Airlines*, 91 Fed. Supp. 191, 192 (S. D. N. Y., 1950).

Aircraft Marine Products v. *Burndy Engineering Co.*, 96 Fed. Supp. 588, 593 (S. D. Cal., 1951).

II. The following cases give the condition of the ocket some consideration on a 1404 (a) motion, but are istinguishable as cases where the original forum had no eal connection with the case:

Levenson v. *Little*, 81 Fed. Supp. 513, 517 (S. D. N. Y., 1949).

United States v. *E. I. duPont de Nemours & Co.*, 83 Fed. Supp. 233, 235 (D. D. C., 1949).

Magnetic Engineering & Mfg. Co. v. *Dings Magnetic Separator Co.*, 86 Fed. Supp. 13, 17 (S. D. N. Y., 1949).

Healy v. *New York, etc., Ry.*, 89 Fed. Supp. 614, 618, 619 (S. D. N. Y., 1949).

Maloney v. *New York, etc., Ry.*, 88 Fed. Supp. 568, 572 (S. D. N. Y., 1949).

Hansen v. *Nash-Finch Co.*, 89 Fed. Supp. 108, 109 (D. Minn., 1950).

Walsh v. *Pullman*, 89 Fed. Supp. 762, 764 (S. D. N. Y., 1949).

Nagle v. *Pennsylvania Ry.*, 89 Fed. Supp. 822, 823 (N. D. Ohio, 1950).

Mazula v. *Delaware & Hudson Ry.*, 90 Fed. Supp. 966, 967 (S. D. N. Y., 1950).

Kasper v. *Union Pacific Ry.*, 97 Fed. Supp. 275, 276 (E. D. Pa., 1951).

APPENDIX D.

District Court Cases Dealing with Section 1404(a).

Hayes v. *Chicago, R. I. & P. R. Co.*, (D. Minn. 4th Div., 1948) 79 Fed. Supp. 821, Nordbye & Joyce.

White v. *Thompson*, 80 Fed. Supp. 411 (N. D. Ill. E. Div., 1948), Barnes.

U. S. v. *National City Lines, Inc., et al.*, 80 Fed. Supp. 734 (S. D. Cal. Central Div., 1948), Yankwich.

Baltimore & Ohio R. Co. v. *Kepner*, 80 Fed. Supp. 738 (1941, 314 U. S. 44, 62 S. Ct. 6, 86 L. Ed. 28).

Nunn v. *Chicago, Milwaukee, St. P. & P. R. Co.*, 80 Fed. Supp. 745 (S. D. N. Y., 1948), Kaufman.

Chaffin v. *Chesapeake & O. Ry. Co.*, 80 Fed. Supp. 957 (E. D. N. Y., 1948), Galston.

Richer v. *Chicago, R. I. & P. R. Co.*, 80 Fed. Supp. 971 (E. D. Missouri E. Div., 1948), Hulen.

Pascarella v. *N. Y. Cent. R. Co.*, 81 Fed. Supp. 95 (E. D. N. Y., 1948), Rayfiel.

Brainard v. *Atchison, T. & S. F. Ry. Co.*, 81 Fed. Supp. 211 (N. D. Ill. E. Div., 1948), Campbell.

Levenson (*Spielberger et al., Intervenors*) v. *Little et al.*, 81 Fed. Supp. 513 (S. D. N. Y. Civil Div., 1949), Ryan.

Johnson v. *Baker et al.*, 81 Fed. Supp. 563 (S. D. N. Y., 1948), Kaufman.

Scott v. *N. Y. Cent. R. Co.*, 81 Fed. Supp. 815 (N. D. Ill. E. Div., 1948), Barnes.

Bolton v. *General Motors Corp.*, 81 Fed. Supp. 851 (N. D. Ill. E. Div., 1949), Campbell.

Perry v. *Atchison, T. & S. F. Ry. Co.*, 82 Fed. Supp. 913 (N. D. Cal. S. Div., 1948), Goodman.

U. S. v. *E. I. duPont de Nemours & Co.*, 83 Fed. Supp. 233 (Dist. of Columbia, 1949), Holtzoff.

Cullinan v. *N. Y. Cent. R. Co.*, 83 Fed. Supp. 870 (S. D. New York, 1948), Hulbert.

Auburn Capitol Theatre Corp. et al., v. *Schine Chain Theatres, Inc., et al.*, 83 Fed. Supp. 872 (S. D. New York Civil Div., 1949), Ryan.

Banachowski v. *Atlantic Refining Co.*, 84 Fed. Supp. 444 (S. D. N. Y., 1949), Ryan.

Republiquie Francaise v. *M., K. & T. Ry. Co., of Texas*, 85 Fed. Supp. 295 (N. D. Texas, Dallas Div., 1949), Atwell.

Republiquie Francaise v. *Gulf, Colorado & Santa Fe Ry. Co.*

Cinema Amusements, Inc., v. *Loew's, Inc., et al.*, 85 Fed. Supp. 319 (D. Delaware, 1949), Rodney.

Brown et al. v. *Insurograph, Inc.*, 85 Fed. Supp. 328 (U. S. D. C. D. Delaware, 1949), Rodney.

Greve v. *Gibraltar Enterprises, Inc.*, 85 Fed. Supp. 410 (D. New Mexico, 1949) Hatch.

Naughton v. *Pennsylvania R. Co. & Nine Other Cases*, 85 Fed. Supp. 761 (E. D. Pennsylvania, 1949), Kirkpatrick.

Magnetic Engineering & Mfg. Co. v. *Dings Magnetic Separator Co.*, 86 Fed. Supp. 13 (S. D. New York, 1949), Hulbert.

U. S. v. *Gerber et al.*, 86 Fed. Supp. 175 (E. D. Pennsylvania, 1949), Bard.

U. S. v. *Briggs Mfg. Co. et al.*, 86 Fed. Supp. 178 (E. D. Pennsylvania, 1949), Bard.

Barnhart et al. v. *John B. Rogers Producing Co.*, 86 Fed. Supp. 595 (N. D. Ohio, W. Div., 1949), Kloeb.

U. S. v. *23 Gross Jars, More or Less of Enca Cream et al.*, (N. D. Ohio, E. Div., 1949), 86 Fed. Supp. 824, Jones.

White v. *Employers' Liability Assur. Corp., Ltd. (Lamb, Third-Party Defendant)*, 86 Fed. Supp. 910 (E. D. South Carolina, Columbia Div., 1949), Wyche.

Apex Electrical Mfg. Co. v. *Sears, Roebuck & Co.*, 87 Fed. Supp. 533 (S. D. Ohio, W. Div., 1949), Nevin.

Brainard v. *Atchison, Topeka & Santa Fe Ry. Co.*, 87 Fed. Supp. 921 (D. Kansas, 1950), Mellott.

Pan American Airways, Inc., v. *Consolidated Vultee Aircraft Corp. et al.*, (87 Fed. Supp. 926), (S. D. New York, 1949), Noonan.

U. S. v. *E. I. duPont deNemours & Co. et al.*, 87 Fed. Supp. 962 (N. D. Ill., E. Div, 1950) LaBuy.

Doyle v. *Southern Pac. Co.*, 87 Fed. Supp. 975 (E. D. Missouri, E. D., 1949), Hulen.

Conley v. *Pennsylvania R. Co.*, 87 Fed. Supp. 980, (S. D. N. Y., 1950), Irving R. Kaufman.

U. S. v. *Scott & Williams, Inc., et al.*, 88 Fed. Supp. 531 (S. D. N. Y., 1950), Irving R. Kaufman.

Lucas v. *N. Y. Central R. Co.*, 88 Fed. Supp. 536 (S. D. N. Y., 1950), Irving R. Kaufman.

Maloney v. *New York, N. H. & H. R. Co.*, 88 Fed. Supp. 568 (S. D. N. Y., 1949), Noonan.

Belair v. *New York, N. H. & H. R. Co.*, 88 Fed. Supp. 572 (S. D. N. Y., 1950), Irving R. Kaufman.

Huff v. *Nashville, Chattanooga & St. Louis Ry.*, 88 Fed. Supp. 735 (S. D. N. Y., 1949), Rifkind.

Keller-Dorian Colorfilm Corp. v. *Eastman Kodak Co.*, 88 Fed. Supp. 863 (S. D. N. Y., 1949), Ryan.

Keller-Dorian Colorfilm Corp. v. *Eastman Kodak Co. et al.*

Ferguson et al. v. *Ford Motor Co. et al.*, 89 Fed. Supp. 45 (S. D. N. Y., 1950), Appeal Dismissed May 8, 1950—See F. 2d 329, Ryan.

Otto v. *Hirl et al.*, 89 Fed. Supp. 72 (S. D. Iowa, Davenport Div., 1950), Switzer.

Hansen v. *Nash-Vinch Co.*, 89 Fed. Supp. 108 (D. Minn., 4th Div., 1950), Nordbye.

Bounds v. *Strekfus Steamers, Inc.*, 89 Fed. Supp. 242 (D. Delaware, 1950), Rodney.

Tivoli Realty, Inc. v. *Paramount Pictures et al.*, 89 Fed. Supp. 278 (D. Del., 1950), Rodney.

Adelman v. *Paramount Pictures Inc., et al.*

Healy v. *New York, New Haven & Hartford R. Co., et al.*, 89 Fed. Supp. 614 (S. D. N. Y., 1949), Ryan.

McCarley v. *Foster-Milburn Co. et al.*, 89 Fed. Supp. 643 (W. D. New York, 1950), Knight.

Walsh et al. v. *Pullman Co. et al.*, 89 Fed. Supp. 762 (S. D. N. Y., 1949), Leibell.

Nagle v. *Pennsylvania R. Co.*, 89 Fed. Supp. 822 (N. D. Ohio E. Div., 1950), Jones.

Spence v. *Norfolk & W. Ry. Co.*, 89 Fed. Supp. 823 (N. D. Ohio E. Div., 1950), Freed.

Wookey v. *Waterman S. S. Corp.*, 89 Fed. Supp. 909 (S. D. N. Y., 1950), McGohey.

Scarmardo v. *Mooring et al.*, 89 Fed. Supp. 936 (S. D. Texas, Houston Div., 1950), Kennerly.

Tisa et al. v. *Potofsky et al.*, 90 Fed. Supp. 175 (S. D. N. Y., 1950), Rifkind.

Smith v. *Louisville & N. R. Co.*, 90 Fed. Supp. 189 (S. D. N. Y., 1950), Kaufman.

Hawks v. *Maryland & Pennsylvania R. Co. et al.*, 90 Fed. Supp. 284 (E. D. Pa., 1950), Bard.

Hampton Theatres, Inc., v. *Paramount Film Distributing Corp. et al.*, 90 Fed. Supp. 645 (Dist. of Columbia, 1950), Tamm.

Nachtman v. *Jones & Laughlin Steel Corp.*, 90 Fed. Supp. 739 (Dist. of Columbia, 1950), Tamm.

Masterpiece Productions, Inc., et al. v. *United Artists Corp.*, 90 Fed. Supp. 750 (E. D. Pa., 1950), McGranery.

Mazula v. *Delaware & Hudson R. Corp.*, 90 Fed. Supp. 966 (S. D. N. Y., 1950), Conger.

Glasfloss Corp. v. *Owens-Corning Fiberglas Corp. et al.*, 90 Fed Supp. 967 (S. D. N. Y., 1950), Conger.

Lewis et al. v. *American Airlines, Inc.*, 91 Fed. Supp. 31 (S. D. N. Y., 1950), Conger.

Skultety v. *Pa. R. Co.*, 91 Fed. Supp. 119 (S. D. N. Y., 1950), Irving R. Kaufman.

Henderson v. *American Airlines, Inc., et al.*, 91 Fed. Supp. 191 (S. D. N. Y., 1950), Irving R. Kaufman.

Nyles v. *American Airlines, Inc., et al.*

Latimer v. *S/A Industrias Reunidas F. Matarazzo*, 91 Fed. Supp. 469 (S. D. N. Y., 1950), Noonan.

Koons et al. v. *Kaiser et al.*, 91 Fed. Supp. 511 (S. D. N. Y., 1950) (1406), Irving Kaufman.

Automatic Washer Co. v. *Easy Washing Machine Corp.*, 91 Fed. Supp. 894 (N. D. N. Y., 1950), Brennan.

Stewart v. *Atchison T. & S. F. Ry. Co.*, 92 Fed. Supp. 172 (E. D. Missouri E. Div., 1949), Hulen.

Beiersdorf & Co., Inc., v. *Duke Laboratories, Inc.*, 92 Fed. Supp. 287 (S. D. N. Y., 1950), McGohey.

Adler v. *McKee*, (S. D. N. Y., 1950) 92 Fed. Supp. 613, Noonan.

Buffington v. *Vulcan Furniture Mfg. Corp.*, 94 Fed. Supp. 13 (W. D. Ark., El Dorado Div., 1950), John E. Miller.

St. Paul Fire & Marine Ins. Co. v. *American Mail Line, Limited*, 94 Fed. Supp. 28 (S. D. N. Y., 1950), Goddard.

Crawford v. *Ann Arbor R. Co.*, 94 Fed. Supp. 29 (S. D. N. Y., 1950), Goddard.

Masterpiece Productions, Inc., et al. v. *United Artists Corp.*, 94 Fed. Supp. 116 (E. D. Pa. 1950), McGranery.

U. S. v. *11 Cases, More or Less, Ido-Pheno-Chon et al.*, 94 Fed. Supp. 925 (D. Oregon, 1950), Fee, James Alger.

Kirk v. *Spur Distributing Co., Inc.*, 95 Fed. Supp. 428 (D. Delaware, 1950), Rodney.

Kostamo v. *Brorby et al.*, (two cases) 95 Fed. Supp. 806 (D. Neb., Omaha Div., 1951), Donohoe.

Tankel et al. v. *Seiberling Rubber Co. et al.*, 95 Fed. Supp. 987 (N. D. Calif., S. Div., 1951), Harris.

LeMee v. *Streckful Steamers, Inc.*, 96 Fed. Supp. 270 (E. D. Missouri, E. Div., 1951), Hulen.

Mason v. *Chicago R. I. & Pacific R. Co.*, 96 Fed. Supp. 361 (W. D. Missouri, W. Div., 1951), Reeves.

Mincy v. *Detroit & Cleveland Nav. Co.*, 96 Fed. Supp. 505 (S. D. N. Y., 1950), Ryan.

Aircraft Marine Products, Inc., v. *Burndy Engineering Co.*, 96 Fed. Supp. 588 (S. D. Cal., Central Div., 1951), Byrne.

Nicol v. *J. C. Penney Co.*, 97 Fed. Supp. 83 (E. D. Mich, S. Div., 1951), Koscinski.

Kasper et al. v. *Union Pac. R. Co.*, 97 Fed. Supp. 275 (E. D. Pa., 1951), McGranery.

Dolly Toy Co. v. *Bancroft Rellim Corp.*, 97 Fed. Supp. 531 (S. D. N. Y., 1951), Irving R. Kaufman.

Alltmont v. *U. S. et al.*, 98 Fed. Supp. 309 (E. D. Pa., 1951), Kirkpatrick.

Herzog v. *Central Steel Tube Co.*, 98 Fed. Supp. 607 (S. D. Iowa, Davenport Div., 1951), Riley.

Mazinski et al. v. *Dight*, 99 Fed. Supp. 192 (W. D. Pa., 1951), Marsh.

Webster-Chicago Corp. v. *Minneapolis-Honneywell Regulator Co.*, 99 Fed. Supp. 503 (D. Delaware, 1951), Rodney.

Burns v. *Chubb*, 99 Fed. Supp. 581 (E. D. Pa., 1951), Welsh.

Goodman v. *Southern Ry. Co.*, 99 Fed. Supp. 852 (S. D. N. Y., 1951), Irving R. Kaufman.

James v. *American Pac. S. S. Co.*, 99 Fed. Supp. 1016 (S. D. N. Y., 1951), S. H. Kaufman.

Federal Electric Products Co. v. *Frank Adam Electric Co.*, 100 Fed. Supp. 8 (S. D. N. Y., 1951), Irving R. Kaufman.

Wilson v. *Kansas City Southern Ry. Co.*, 101 Fed. Supp. 56 (W. D. Missouri W. Div., 1951), Ridge.

Lehman et al. v. *Napier et al.*, 101 Fed. Supp. 313 (S. D. Iowa Central Div., 1951), Riley.

Arrowhead Co. Inc., et al., v. *The Aimee Lykes et al.*, 101 Fed. Supp. 896 (S. D. N. Y., 1950), Noonan.

Ortiz v. *Union Oil Co. of California*, 102 Fed. Supp. 492 (S. D. N. Y., 1952), Weinfeld.

Reade Shirts, Inc., v. *Commonwealth Ins. Co. of New York*, 102 Fed. Supp 941 (S. D. N. Y., 1952), McGohey.

Anthony v. *R. K. O. Radio Pictures*, 103 Fed. Supp. 56 (S. D. N. Y., 1951), S. H. Kaufman.

Tivoli Realty v. *Paramount Pictures*, 103 Fed Supp. 174 (D. Del., 1951), Rodney.

McDaniel v. *Drotman*, 103 Fed. Supp. 643 (W. D. Ky., 1952), Swinford.

Jerclaydon, Inc., v. *Hosid Products, Inc.*, 104 Fed. Supp. 122 (E. D. N. Y., 1952), Byers.

U. S. v. *Reid*, 104 Fed. Supp. 260 (E. D. Ark., 1952), Lemley.

Jenkins v. *Wilson Frt. Forwarding Co.*, 104 Fed. Supp. 422 (S. D. N. Y., 1952), Irving R. Kaufman.

Lynch v. *Luckenbach S. S. Co.*, 104 Fed. Supp 494 (S. D. N. Y., 1952), Leibell.

Savoia Films S. A. I. v. *Vanguard Films, Inc. et al.*, 10 F. R. D. 65 (S. D. N. Y., 1950) Kaufman, Irv.

Walsh et al. v. *Pullman Co. et al.*, 10 F. R. D. 7 (S. D. N. Y., 1948), Leibell.

Berlin et al. v. *Club 100, Inc.*, 12 F. R. D. 129 (D Massachusetts, 1951), McCarthy.

APPENDIX E.

The following cases cite *Gulf Oil* v. *Gilbert*, as determining the criteria to consider on a motion to transfer under 28 U. S. C. 1404(a), or otherwise hold that a heavy balance of convenience is necessary before a transfer will be made:

Court of Appeals.

Hammett v. *Warner Bros. Pictures*, 176 F. 2d 145 (2d Cir., 1949).

Headrick v. *Atchison, T. & S. F. Ry.*, 182 F. 2d 305, 310 (10th Cir., 1950), Pickett, C. J.

Ford Motor Co. v. *Ryan*, 182 F. 2d 329, 330 (2d Cir., 1950), Frank, C. J.

Nicol v. *Koscinski*, 188 F. 2d 537 (6th Cir., 1951), Simons, J.

Wiren v. *Laws*, *Wiren* v. *Paramount Pictures, Inc.*, 194 F. 2d 873 (D. C. Cir., 1951).

District Courts.

Hayes v. *Chicago, R. I. & P. Ry.*, 79 Fed. Supp. 821, 823 (D. Minn., 1948), Nordbye, J.

Richer v. *Chicago, R. I. & P. Ry.*, 80 Fed. Supp. 971, 972 (E. D. Mo., 1948), Hulen, J.

Johnson v *Baker*, 81 Fed. Supp. 563, 565 (S. D. N. Y., 1948), Kaufman, J.

Cullinan v. *New York Central Ry.*, 83 Fed. Supp. 870, 872 (S. D. N. Y., 1948), Hulbert, J.

Healy v. *N. Y., N. H. & H. R. Co.*, 89 Fed. Supp. 614 (S. D. N. Y., 1949), Ryan, J.

Levenson v. *Little*, 81 Fed. Supp. 513, 514 (S. D N. Y., 1949), Ryan, J.

Auburn Capital Theatre Corp. v. *Schine Chain Theatres*, 83 Fed. Supp. 872, 874 (S. D. N. Y., 1949), Ryan, J.

Naughton v. *Pennsylvania Ry.*, 85 Fed. Supp. 671, 764 (E. D. Pa., 1949), Kirkpatrick, J.

Cinema Amusements v. *Loew's, Inc.*, 85 Fed. Supp. 319, 322 (D. Del., 1949), Rodney, J.

Brown v. *Insurograph, Inc.*, 85 Fed. Supp. 328, 329 (D. Del., 1949), Rodney, J.

Magnetic Engineering & Mfg. Co. v. *Dings Separator Co.*, 86 Fed. Supp. 13, 15 (S. D. N. Y., 1949), Hulbert, J.

Apex Electrical Mfg. Co. v. *Sears, Roebuck & Co.*, 87 Fed. Supp. 533, 534 (S. D. Ohio, 1949), Nevin, J.

Pan American Airways v. *Consolidated Vultee Aircraft*, 87 Fed. Supp. 926, 930 (S. D. N. Y., 1949), Noonan, J.

United States v. *Scott & Williams*, 88 Fed. Supp. 531, 533 (S. D. N. Y., 1950), Irving Kaufman, J.

Lucas v. *New York Central Ry.*, 88 Fed. Supp. 536, 538 (S. D. N. Y., 1950), Irving Kaufman, J.

Savoia Films v. *Vanguard Films*, 10 F. R. D. 64, 67 (S. D. N. Y., 1950), Irving Kaufman, J.

Maloney v. *New York Central Ry.*, 88 Fed. Supp. 568, 570 (D. D. N. Y., 1949), Noonan, J.

Belair v. *New York, N. H. & H. Ry.*, 88 Fed. Supp. 572, 573 (S. D. N. Y., 1950), Irving Kaufman, J.

Ferguson v. *Ford Motor Co.*, 89 Fed. Supp. 45, 50, 51 (S. D. N. Y., 1950), Ryan, J.

Otto v. *Hirl*, 89 Fed. Supp. 72, 73 (S. D. Ia., 1950), Switzer, J.

Hansen v. *Nash-Finch Co.*, 89 Fed. Supp. 108 (D. Minn., 1950), Nordbye, J.

Bounds v. *Streckfus Steamers, Inc.*, 89 Fed. Supp. 242, 243 (D. Del., 1950), Rodney, J.

Walsh v. *Pullman*, 89 Fed. Supp. 762, 764 (S. D. N. Y., 1949), Leibell, J.

Wookey v. *Waterman S. S. Corp.*, 89 Fed. Supp. 909, 910 (S. D. N. Y., 1950), McGohey, J.

Hampton Theatres v. *Paramount Film Distributing Corp.*, 90 Fed. Supp. 645, 647 (D. D. C., 1950), Tamm, J.

Glasfloss Corp. v. *Owens-Corning Fiberglas Corp.*, 90 Fed. Supp. 967, 971 (S. D. N. Y., 1950), Conger, J.

Skultety v. *Pennsylvania Ry.*, 91 Fed. Supp. 118, 119 (S. D. N. Y., 1950), Irving Kaufman, J.

Henderson v. *American Airlines*, 91 Fed. Supp. 191, 192 (S. D. N. Y., 1950), Irving Kaufman, J.

Latimer v. *S/A Industrias Reunidas F. Matarazzo*, 91 Fed. Supp. 469, 470 (S. D. N. Y., 1950), Noonan, J.

Automatic Washer Co. v. *Easy Washing Machine Corp.*, 91 Fed. Supp. 894, 895 (N. D. N. Y., 1950), Brennan, J.

P. Beiersdorf Laboratories v. *Duke Laboratories, Inc.*, 92 Fed. Supp. 287, 288 (S. D. N. .Y, 1950), McGohey, J.

Adler v. *McKee*, 92 Fed. Supp. 613, 614 (S. D. N. Y., 1950), Noonan, J.

Masterpiece Productions v. *United Artists Corp.*, 94 Fed. Supp. 116, 117 (E. D. Pa., 1950), McGranery, J.

Tankel v. *Seiberling Rubber Co.*, 95 Fed. Supp. 987, 988 (N. D. Cal., 1951), Harris, J.

Nicol v. *J. C. Penney Co.*, 97 Fed. Supp. 83, 85 (E. D. Mich., 1951), Koscinski, J.

Dolly Toy Co. v. *Bancroft Rellim Corp.*, 97 Fed. Supp. 531, 534 (S. D. N. Y., 1951), Irving Kaufman, J.

Kasper v. *Union Pacific Ry.*, 97 Fed. Supp. 275, 276 (E. D. Pa., 1951), McGranery, J.

Mason v. *Chicago, R. I. P. Ry.*, 96 Fed. Supp. 361, 363 (W. D. Mo., 1951), Reeves, J.

Aircraft Marine Products v. *Burndy Engineering Co.*, 96 Fed. Supp. 588, 591 (S. D. Cal., 1951), Byrne, J.

James v. *American Pac. S. S. Co.*, 99 Fed. Supp. 1016 (S. D. N. Y., 1951), S. H. Kaufman, J.

Federal Electric Products Co. v. *Frank Adair Electric Co.*, 100 Fed. Supp. 8 (S. D. N. Y., 1951), Irving R. Kaufman, J.

Lehman v. *Napier*, 101 Fed. Supp. 313 (S. D. Iowa, 1951), Riley, J.

Ortiz v. *Union Oil Co. of California*, 102 Fed. Supp. 492 (S. D. N. Y., 1952), Weinfeld, J.

McDaniel v. *Drotman*, 103 Fed. Supp. 643 (W. D. Ky., 1952), Swinford, J.

Jerclaydon, Inc., v. *Hosio Products, Inc.*, 104 Fed. Supp. 122 (E. D. N. Y., 1952), Byers, J.

Anthony v. *R. K. O. Radio Pictures, Inc.*, 103 Fed. Supp. 56 (S. D. N. Y., 1951), S. H. Kaufman, J.

Tivoli Realty v. *Paramount Pictures, Inc.*, 103 Fed. Supp. 174 (D. Del., 1951), Rodney, J.

Reade Shirts, Inc., v. *Commonwealth Ins. Co. of New York*, 102 Fed. Supp. 941 (S. D. N. Y., 1952), McGohey, J.

Jenkins v. *Wilson Freight Forwarding Co.*, 104 Fed. Supp. 422 (S. D. N. Y., 1952), Irving Kaufman, J.

Lynch v. *Luckenbach S. S. Co.*, 104 Fed. Supp. 494 (S. D. N. Y., 1952), Leibell, J.

APPENDIX F.

The following cases either repudiate the doctrine of *Gulf Oil* v. *Gilbert* or otherwise hold that 28 U. S. C. 1404(a) affords the district court far more discretion than the doctrine of *forum non conveniens*:

Court of Appeals.

Amalgamated Ass'n of Street, Electric Railway and Motor Coach Employees of America v. *Southern Bus Lines*, 172 F. 2d 946, 948 (5th Cir., 1949), Sibley, C. J.

Jiffy Lubricator v. *Stewart-Warner Corp.*, 177 F. 2d 360, 362 (4th Cir., 1949), Parker, C. J.

Schoen v. *Mountain Producers Corp.*, 176 F. 2d 707 (3rd Cir., 1949).

All States Freight, Inc., v. *Modarelli*, ... F. 2d ....., (3rd Cir., May 8, 1952).

District Courts.

Brainard v. *Atchison, T. & S. F. Ry.*, 81 Fed. Supp. 211 (N. D. Ill., 1948), Campbell, J.

United States v. *E. I. duPont de Nemours & Co.*, 83 Fed. Supp. 233 (D. D. C., 1949), Holtzoff, J.

Greve v. *Gibraltar Enterprises*, 85 Fed. Supp. 410, 413 (D. N. M., 1949), Hatch, J.

United States v. *Gerber*, 86 Fed. Supp. 175, 178 (E. D. Pa., 1949), Bard, J.

United States v. *Briggs*, 86 Fed. Supp. 178 (E. D. Pa., 1949), Bard, J.

White v. *Employers' Liability Assurance Corp.*, 86 Fed. Supp. 910, 912 (E. D. S. C., 1949), Wyche, J.

United States v. *E. I. duPont de Nemours & Co.*, 87 Fed. Supp. 962, 965 (N. D. Ill., 1950), La-Buy, J.

Huff v. *Nashville & Chattanooga Ry.*, 88 Fed. Supp. 735, 736 (S. D. N. Y., 1949), Rifkind, J.

McCarley v. *Foster-Milburn Co.*, 89 Fed. Supp. 643, 647 (W. D. N. Y., 1950), Knight, J. (order set aside by C. A. 2).

Spence v. *Norfolk & W. Ry.*, 89 Fed. Supp. 823, 824 (N. D. Ohio, 1950), Freed, J.

APPENDIX G.

I. The following State Statutes provide for a change of venue for reasons of *forum non conveniens*:

1. Arizona—2 Arizona Code Annotated, 1939, Sec. 21-104. Change of venue for cause—decision reviewable —if either party to a civil action pending with superior court shall, after answer has been filed, file an affidavit in the action alleging any of the following grounds therefor and give five days notice to the opposite party, the venue thereof may be changed as hereinafter provided:

> "(2) That the convenience of witnesses and the ends of justice would be promoted by the change."

2. California—C. C. P., Sec. 397 (cases in which court may change place of trial). The court may, on motion, change the place of trial in the following cases:

> "(3) When the convenience of witnesses and the ends of justice would be promoted by the change; * * *."

Sec. 963 (cases in which appeal may be taken from superior court). An appeal may be taken from a superior court in the following cases:

> "2. From an order granting a new trial or denying a motion for judgment notwithstanding the verdict, or granting or dissolving an injunction, or refusing to grant or dissolve an injunction, or appointing a receiver, or dissolving or refusing to dissolve an attachment, or changing or refusing to change the place of trial."

3. Colorado—Rule 98-F. Change of venue may be granted when action is brought in the wrong county or

when the convenience of witnesses or the ends of justice would be promoted thereby.

4. Idaho—I. C. A., Sec. 5-406. Change of Venue.

"(3) When the convenience of witnesses and the ends of justice would be promoted by the change."

5. Indiana—Indiana Statutes, Sec. 190 (Baldwin, 1934). The Court in term, or the judge thereof in vacation, shall change the venue of any civil action upon the application of either party, made upon affidavit showing one or more of the following causes:

"Fifth. Showing to the satisfaction of the court that the convenience of witnesses and the ends of justice would be promoted by the change."

6. Minnesota—2 Minn. Stat., 1945, c. 542, Sec. 542.11. Change of Venue by Order of Court; Grounds. The venue of any civil action may be changed by order of the Court in the following cases:

"(4) When the convenience of witnesses and the ends of justice would be promoted by the change."

7. Montana—Rev. Codes, Sec. 9098. The court or judge must, on motion, change the place of trial in the following cases:

"(3) When the convenience of witnesses and the ends of justice would be promoted by the change."

8. Nevada—Nev. C. L., Sec. 8572. The court may, on motion, change the place of trial in the following cases:

"(3) When the convenience of witnesses and the ends of justice would be promoted by the change."

9. New Hampshire—Rev. Laws of N. H., 1942, c. 384, Sec. 3. The superior court may change the venue in any civil proceeding when justice or convenience requires it.

10. New York—(Civil Practice Act, Sec. 187, Thompson's Laws of New York, 1939). Change of place of trial. The Court, by order, may change the place of trial of an action in the Supreme Court in either of the following cases:

"(3) Where the convenience of material witnesses and the ends of justice will be promoted by the change."

11. North Carolina—Gen. Stat., North Carolina, 1943, Sec. 1-83. The Court may change the place of trial in the following cases:

"2. When the convenience of the witnesses and the end of justice would be promoted by the change."

12. North Dakota—Compiled Laws of North Dakota, 1913, Sec. 7418. Defendant must ask change. The court may change the place of trial in the following cases:

"3. When the convenience of witnesses and the ends of justice would be promoted by the change."

13. Oregon—Oregon Code, 1930, Sec. 1-404. When place of trial may be changed. The court or judge thereof may change the place of trial, on the motion of either party to the action, when it appears from the affidavit of such party, or, if he is not a resident of the county, the affidavit of anyone in his behalf, either * * *.

"4. That the convenience of witnesses and the parties would be promoted by such change."

14. South Carolina—Code of Laws of South Carolina, 1932, Sec. 426. Changing place of trial. The court may change the place of trial in the following cases:

"3. When the convenience of witnesses and the ends of justice would be promoted by the change."

15. South Dakota—Compiled Laws of South Dakota, 1929, Sec. 2328. The Court may change the place of trial in the following cases:

> "3. When the convenience of witnesses and the ends of justice will be promoted by the change."

16. Utah—Rev. Stat. of Utah, 1933, Code of Civil Procedure, Secs. 104-4-9. Change of venue; Grounds. The Court may, on motion, change the place of trial in the following cases:

> "3. When the convenience of witnesses and the ends of justice will be promoted by the change."

17. Washington—Rem. Rev. Stat., Sec. 209. The Court may, on motion, change the place of trial when satisfied that:

> "* * * the convenience of witnesses or the ends of justice would be forwarded by the change."

18. Wisconsin—Wis. Stat., 1949, Sec. 261.04. Change of venue, grounds for. The court or the presiding judge thereof may change the place of trial in the following cases:

> "(2) When the convenience of witnesses and the ends of justice would be promoted."

19. Wyoming—Wyoming Rev. Stat., 1931, Sec. 89-1101. Causes for changes in civil actions—Affidavit. Whenever either party to a civil action in any district court of the state shall file an affidavit in the case, stating one or more of the following causes:

> "(7) When the affidavit shall show to the satisfaction of the court or a judge that the convenience of witnesses or the ends of justice would be promoted thereby."

In either case the court in term or the judge in vacation shall, within ten days after filing such affidavit, make and enter an order changing the venue in such action or calling on some other judge of the district court of the State to preside at the trial of the case as hereinafter provided; provided, the presiding judge may on his own motion grant at any time a change of judge or a change of venue when it appears that the ends of justice would be promoted thereby.

II. The following are representative state decisions providing for review of motions for change of venue either by appeal or by extraordinary writs.

California:

Barber v. *Palo Verde Mut. Water Assoc.*, 246 Pac. 1044 (Cal., 1926) (Appeal).

Rice v. *Schubert*, 226 Pac. 2d 50 (D. C. A. Cal., 1951) (Appeal).

Idaho:

Moscow Vets Club, Inc., v. *Bishop*, 207 Pac. 2d 503 (Idaho, 1949) (Appeal).

Sweeney v. *American National Bank*, 136 Pae. 2d 973 (Idaho, 1943) (Appeal).

Indiana:

State ex rel. Lindsey v. *Beavers*, 75 N. E. 2d 660 (Ind., 1947) (Mandamus).

State ex rel. Van Horne v. *Sullivan*, 188 N. E. 672 (Ind., 1934) (Mandamus).

Minnesota:

Miller v. *Anchor Casualty Co.*, 45 N. W. 2d 705 (Minn., 1951) (Mandamus).

State ex rel. Hilton v. *District Court of Ramsey County*, 198 N. W. 667 (Minn., 1924) (Mandamus).

Montana:

Maio v. *Greene*, 137 Pac. 2d 670 (Mont., 1943) (Appeal).

Conway v. *Fabian*, 63 Pac. 2d 1022 (Mont., 1936) (Appeal).

Nevada:

Stocks v. *Stocks*, 183 Pac. 2d 617 (Nev., 1947) (Appeal).

Fabbi v. *First National Bank of Nevada*, 153 Pac. 2d 122 (Nev., 1944) (Appeal).

New York:

Seeley v. *New York Tel. Co.*, 102 N. Y. S. 2d 277 (App. Div., 3d Dept., 1951) (Appeal).

Mau-Ste. Fallsburg Corp. v. *Cohen*, 103 N. Y. S. 2d 490 (App. Div., 2d Dept., 1951) (Appeal).

North Carolina:

Hartford Accident & Indemnity Co. v. *Hood*, 34 S. E. 2d 204 (N. C., 1945) (Appeal).

Howard v. *Queen City Coach*, 193 S. E. 138 (N. C., 1937) (Appeal).

North Dakota:

Ott v. *Kelley*, 252 N. W. 269 (N. D., 1934) (Appeal).

McConnen v. *Sletten*, 213 N. W. 483 (N. D., 1927) (Appeal).

Oregon:

Best v. *Parkes*, 161 Pac. 255 (Ore., 1916) (Mandamus).

South Carolina:

Smith v. *Atlantic Coast Line Ry.*, 63 S. E. 2d 311 (S. C., 1951) (Appeal).

Reynolds v. *Atlantic Coast Line Ry.*, 59 S. E. 2d 344 (S. C., 1950) (Appeal).

South Dakota:

Herron v. *Fox*, 288 N. W. 459 (N. D., 1939) (Appeal).

Olson v. *City of Sioux Falls*, 262 N. W. 85 (S. D., 1935) (Appeal).

Utah:

Pace v. *Wolf*, 289 Pac. 1102 (Utah, 1930) (Mandamus).

Hale v. *Baker*, 259 Pac. 928 (Utah, 1927) (Mandamus).

Washington:

State ex rel. Bugenhagen v. *Superior Court for Pierce County*, 177 Pac. 2d 885 (Wash., 1947) (Certiorari).

State ex rel. Beffer v. *Superior Court for Whatcom County*, 100 Pac. 2d 6 (Wash., 1940) (Mandamus).

Wisconsin:

State ex rel. Jefson v. *Mahoney*, 235 N. W. 926 (Wis., 1931), (Mandamus).

State ex rel. Nichols v. *Circuit Court of Outagamie County*, 208 N. W. 490 (Wis., 1926) (Certiorari).

Wyoming:

State ex rel. Poston v. *District Court of Eighth Judicial District, etc.*, 269 Pac. 35 (Wyo., 1928) (Prohibition).

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Supreme Court of the United States

OCTOBER TERM, 1952

No. 240

THE CRUMMER COMPANY, and R. E. CRUMMER & COMPANY,

Petitioners,

vs.

JESSIE BALL duPONT, et al., AS TRUSTEES, ETC., et al.,

Respondents.

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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Supreme Court of the United States

OCTOBER TERM, 1952

No. 240

THE CRUMMER COMPANY, and R. E. CRUMMER & COMPANY,

Petitioners,

vs.

JESSIE BALL duPONT, et al., AS TRUSTEES, ETC., et al.,

Respondents.

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Opinions Below

The findings of fact and opinion of the District Court (R. pp. 628-643) are unreported.

The opinion of the Court of Appeals for the Fifth Circuit (R. 663-665) is reported in 196 F. 2d 468.

Jurisdiction

Petitioners seek to invoke the jurisdiction of this Court under 28 U.S.C., Section 1254(1). In the decision below the Court of Appeals for the Fifth Circuit ruled on appeal that the transfer order of the District Court under 28 U.S.C. 1404(a) was interlocutory and not falling within one of the

exceptions provided by statute was not appealable and dismissed the appeal.[1] 196 F. 2d 468.

This Court has not normally exercised its power to issue certiorari under Section 1254(1) to review a decree of a Circuit Court of Appeals on an appeal from an interlocutory order of a District Court, in absence of some exceptional reason. *American Construction Co.* v. *Jacksonville T. K. R. Co.*, 148 U.S. 372, 384. No valid exceptional reason exists in the case at bar.

Questions Presented

As we view it, the questions presented[2] are as follows:

1. Did the Court of Appeals correctly decide that the transfer order under 28 U.S.C. 1404(a) was the type of interlocutory order which was not appealable?

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[1]On April 24, 1951 the Court of Appeals had previously reviewed this same transfer order upon almost the identical record now before this Court, upon the petitioners' motion for leave to file a petition for mandamus directed to the District Judge. The Court of Appeals denied the motion and this Court refused to grant certiorari to review such denial on December 11, 1951. *Crummer Co. et al.*, v. *Barker*, 96 L.Ed. 139 (Adv. Op.)

[2]Petitioners assert questions presented are as follows (Pet. p. 3, 4):

1. Whether pursuant to the standards established by this court in *Gulf Oil Corp.* v. *Gilbert*, 330 U.S. 501 (1947), a transfer order purportedly entered under Section 1404(a) of Title 28, U.S. Code, should stand unreversed in the light of the facts * * *.

2. Whether an erroneous transfer order under Section 1404(a) of Title 28, U.S. Code, is reviewable before trial, either by appeal or by extraordinary writ, considering the facts that * * *.

3. Whether a plaintiff can be forced to defend a counterclaim in the transferee forum, when that counterclaim could not have been brought there as an original action, because of improper venue.

Petitioners claim that the facts upon which they seek certiorari are undisputed (Pet. Brief, p. 3, f. note 1). This contention is erroneous since the facts as found by the District Judge (R. p. 628-642) and as stated in this brief (p. 3 to 8) are at considerable variance from the facts, and the conclusions drawn therefrom, as set forth by petitioners

2. Did the Court of Appeals properly refuse to vacate and set aside the transfer order by their refusal to grant petitioners' second petition for extraordinary relief?[3]

Statement of Facts

A. Scope of the Action.

While denominating their action one to recover treble damages for an alleged conspiracy to monopolize interstate trade in defaulted Florida municipal securities and the refunding thereof, the plaintiffs, which are both Delaware corporations, basically ground their action upon four allegedly malicious and improper abuses of legal process, around which primarily all the overt acts averred in the elaborate and embroidered Complaint revolve,[4] to wit:

(1) A criminal prosecution of, among others, the plaintiffs, authorized by the Attorney General of the United States and filed in 1944 by the United States Attorney in the State of Kansas, together with the preliminary investigation, conducted under appropriate authorization by the Post Office Department and the Securities and Exchange Commission, through their identified employees, giving rise to such criminal prosecution (R. pp. 31-41, inclusive);

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[3]The Court of Appeals had previously reviewed the same transfer order on petitioners' motion for leave to file a petition for writ of mandamus on April 24, 1951 (Pet. Brief at p. 14). There have been no further proceedings or new facts relating to the transfer order since that first review of the transfer order.

[4]It will be noted that in the petitioners' brief, they describe the overt acts charged against the defendants under their headings: (1) "instigation of federal criminal prosecutions"; (2) "interference with the procurement by The Crummer Company of a license to do business in Florida as a dealer in municipal securities"; and (3) "the instigation of civil litigation". (Brief of Petitioners, pp. 5 and 6. *No one of these overt acts occurred in the Orlando Division of the Southern District.* At least one of them took place wholly in the Tallahassee Division of the Northern District, to which this suit was properly transferred, and another partially was centered in the Tallahassee Division.

(2) Investigations conducted in January, 1943 and 1944, at Tallahassee, Florida, by the Securities Commission of the State of Florida, a statutory body authorized under Chapter 517, Florida Statutes Annotated, to determine whether to grant the plaintiff, The Crummer Company, a license to do business as a security dealer within the State of Florida, during one of which investigations certain of the defendants allegedly testified, and after which plaintiffs assert in their Complaint the Commission improperly denied the plaintiff such license (R. pp. 41-4, inclusive);

(3) A legislative investigation authorized at Tallahassee, Florida, in May, 1941, but not activated until 1942 by Executive Proclamation with funds made available by the Governor of Florida, into the refunding of defaulted Florida taxing unit securities, including those of the plaintiff, R. E. Crummer & Company, carried out under the authority of a House Resolution duly approved by the House of Representatives of the State of Florida and under an Executive Proclamation of the Governor of Florida out of the emergency funds subject to the Governor's orders (R. pp. 50-52).

(4) Resort in 1942 and 1944 by certain of the defendants to suits in the federal and state courts for declaratory judgments to determine the validity of certain of the refunding contracts of the plaintiff, R. E. Crummer & Company (R. pp. 44-9, inclusive).

The Complaint, also, charges as overt acts against the defendants the refusal in the latter part of 1941 by the State Board of Administration of the State of Florida as to Sarasota County, and the governing county board of Lee County, Florida, to carry out certain alleged contractural rights of the plaintiff R. E. Crummer & Company (R. pp. 49-50).

The defendants denied generally the broad allegations of wrong-doing leveled by the plaintiffs at the individual

defendants, Federal officials charged with the enforcement of criminal law and State legislative and administrative officers engaged in the discharge of duties under appropriate legislative resolution or by virtue of pertinent statutory authority, and certain of the defendants countered with the charge that the plaintiffs through improper means had actually achieved an illegal monopoly in the securities of financially embarrassed Florida taxing units deriving therefrom unconscionable improper gains. Cf. *United Mutual Life Ins. Co.* v. *Avon Park*, 1940, 311 U.S. 138, rehearing denied 311 U.S. 730.

The Complaint alleges that some twenty-two overt acts done in connection with the conspiracy and representing the basis of plaintiffs' cause of action were committed by the defendants in widely scattered places including the State of Florida. Of the twenty-two overt acts, eleven were allegedly committed in the Northern District of Florida, ten of which occurred in the Tallahassee Division to which this action has been transferred for trial (R. pp. 32-43).

Of the four overt acts alleged to have been committed in the Southern District of Florida, not one occurred in the Orlando Division, where this action was originally commenced by the plaintiffs (R. pp. 45-50). Three were alleged to have been committed in Topeka, Kansas in conjunction with hearings before the Grand Jury which returned indictments against the plaintiffs (R. pp. 35-36); and four were alleged to have been committed in the District of Columbia in connection with the United States Post Office Department and the activities of its employees (R. pp. 31, 33, 34).

Domicile of the Parties

The petitioner, R. E. Crummer & Company, a Delaware corporation, engaged primarily in the refunding of the se-

curities of Florida taxing units from 1934 through the year 1942 (R. 629-30) and maintained offices in Florida, Kansas, and Illinois (R. 437-449). In 1942, it ceased to do business and according to records filed with the Secretary of the State of Delaware (R. 436) it distributed its assets among its ten stockholders[5] (R. 436) all of whom were members of the Crummer family. These persons are all domiciled outside the State of Florida. Since January 1, 1943 R. E. Crummer & Company has maintained no office and has had no employees within the State of Florida (R. 420). Its president, R. E. Crummer, has his legal residence in Reno, Nevada; its secretary and treasurer, Joy Bowerman, maintains the Company's only office in Chicago, Illinois. Its records are spread about, some in the possession of its auditor or attorneys in Wichita, Kansas, some at the only corporate offices now maintained in Chicago, Illinois, and some left with its co-defendant, The Crummer Company (R. pp. 419-423, inclusive).

In 1943, The Crummer Company, another Delaware Corporation, was formed, the main purposes and objects of which were to engage in the buying, selling and otherwise dealing in municipal securities of taxing units as distinguished from the main purposes and objects of the plaintiff, R. E. Crummer & Company, which had been to restore the credit of financially distressed Florida taxing units through refundings of outstanding securities (R. 21). Some of the former records and personnel of R. E. Crummer & Company were taken over by the new company, The Crummer Company (R. 629). The Crummer Company maintains its Florida office at Orlando (R. 354) and the existence or whereabouts of other offices is not disclosed.

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[5]All corporate stock was then surrendered to the corporation in connection with the distribution of its assets. (R. 435).

The defendants, Edward Ball and St. Joe Paper Company, are residents of the Northern District of Florida (R. 631) (the transferee forum), Edward Ball residing in the Tallahassee Division (R. 631), and St. Joe Paper Company having its principal offices in the Marianna Division (R. 631).[6]

The defendants, Jessie Ball duPont, Roger L. Main, Florida National Bank of Jacksonville, Clyde C. Pierce, Pierce Corporation and Cummer Sons Cypress Company, are residents of the Jacksonville Division of the Southern District of Florida (R. 631).

The defendants, E. J. Mansfield, Walter P. Fuller, S. Wallace Shafer, and Walter P. Gall are residents of the Tampa Division of the Southern District of Florida (R. 632).

The defendants, Howard S. Wheller, Paul L. Pierce, Loomis C. Leedy and Leedy-Wheeler-Alleman, Inc., are residents of the Southern District of Florida, Orlando Division (R. 631).

B. Events in the District Court

The Attorney General of the State of Florida petitioned the District Court for leave to appear as attorney on behalf of the defendants, Clement, Shafer, and Fuller (R. 318).[7] While such petition was pending and by permission of the Court, the Attorney General filed a Motion to Transfer the cause to the Tallahassee Division under Section 1404(a), 28 U.S.C. Such Motion was joined in and adopted by the defendants, Clement, Shafer and Fuller as their own Motion

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[6]Ball and St. Joe Paper Co. are two of the principal defendants (R. 23-27) whose overt acts are heavily relied upon (R. 27-29, 42).

[7]Florida Constitution, Article IV, Section 22; F.S.A. 16.01; *State* v. *Gleason* 12 Fla. 190.

(R. 337-339). All other defendants except two (R. 629) thereafter made similar motions to transfer, in most instances joining in the Attorney General's Motion and adopting it as their own (R. 340-345).

One of the defendants filing no motion to transfer was Mansfield, a retired post office inspector who is now represented by United States Government counsel; i.e. a United States attorney (R. 629). The other such defendant was Cummer Sons Cypress Company, one of the lesser defendants (R. 46), whose residence is in the Jacksonville Division.

After the filing of the Motions to Transfer, Judge Barker gave due written notice to counsel for all parties that a hearing would be held upon all motions to transfer and joinders therein (R. 465). At the hearing held on November 5, 1950 the only parties objecting to the transfer were the petitioners (R. 465). All defendants, except Mansfield and Cummer Sons Cypress Co., appeared responsive to the Judge's notice of hearing and vigorously urged the transfer (R. 465-546).

Following the hearing, Judge Barker made numerous findings of fact (R. 628) and ordered the case transferred to the Tallahassee Division pursuant to Section 1404(a) (R. 642).

The District Court in the findings of fact found, among other things, that due to the scope of the action set forth in the pleadings, as indicated above, that: (a) the best centralized source of documentary proof needed at the trial was in Tallahassee in the offices of various State agencies (R. 635-638); (b) because of the long period of time covered by the pleadings and the technical nature of the subject matter of the suit that documentary proof would be an important source of evidence for both parties (R. 639); (c) ten of the twenty-two alleged overt acts occurred in the

Tallahassee Division, the transferee forum (R. 633) and none occurred in Orlando, the transferor forum (R. 633); (d) many, if not most, of the witnesses, for both parties, would come from around Tallahassee, the locale of two thirds of the Florida overt acts (R. 641); (e) in view of the expected long trial and the condition of the respective dockets, a speedier trial was much more likely in the Tallahassee Division (R. 641); and (f) the action could have been originally brought in the Tallahassee Division, within the meaning of Section 1404(a) and Section 1392(a) of 28 U.S. Code (R. 632).

Judge Barker, after an examination of all factors (R. 642) in terms of "convenience of parties and witnesses, in the interest of justice" found that "the Record shows that a sufficient weight of factors favoring the transfer has been established to impel the granting of the motion to transfer." He found and concluded the convenience of parties and prospective witnesses would be better served by the transfer (R. 642) and that in the interest of justice the transfer should be made (R. 642).

It was apparent that the District Judge considered the domicile of all parties (R. 629, 631); the location of their records (R. 639), and the sources of other documentary evidence (R. 635-639); the witnesses likely to be called by both parties at the trial (R. 640) and the location of the alleged overt acts (R. 633) in making his decision as to the "convenience of parties and witnesses."

C. The Proceedings in the Court of Appeals

On April 24, 1951, the petitioners filed a motion in the Court of Appeals for the Fifth Circuit for leave to file a petition for mandamus or other relief to be directed to Judge Barker, to vacate and set aside the transfer order, attaching

as exhibits to said motion and petition, copies of all appropriate proceedings below (R. 665). After oral argument and upon consideration of the motion for leave to file and the said petition, the Court of Appeals denied the motion without opinion on April 24, 1951 (R. 665). This Court on Dec. 11, 1951 denied certiorari to review that decision. (*The Crummer Co. & R. E. Crummer Co.* v. *Barker,* October Term, 1951, No. 323).

Petitioners claim that this proceeding was not an appellate hearing on the merits to review the transfer order (Pet. Brief p. 14). However, Judge Borah who wrote the opinion below (196 F. 2d 468) and who was one of the judges sitting at the April 24, 1951 hearing, had a different opinion. He stated in regard to the prior hearing at p. 469 of 196 F. 2d:

> "After oral argument and upon full consideration of the proceedings below, this Court entered its order denying the motion for leave to file a petition for writ of mandamus. Implicit in this order is the finding that the District Judge did not abuse his discretion.
>
> "Having failed to secure relief in this Court by mandamus, the appellants perfected this appeal, again seeking a review of the order of transfer * * *."

Counsel for petitioners are also mistaken in their statement that the entire mandamus proceeding in the Court of Appeals was completed in less than an hour. While not pertinent here, it is safe to observe that more nearly the greater part of the working day was spent from the time of filing the petitioners' motion for leave to file a petition for mandamus, the argument of counsel and the subsequent consideration by the Court.

After motion for leave to file was denied, the petitioners docketed an appeal from the transfer order in the Court of

Appeals and requested that the appeal, if necessary, be treated as an application for such extraordinary relief as might be proper for the purpose of setting the transfer order aside.[8]

In response, the respondents herein filed motions to dismiss the appeal on the ground that the transfer order was not the type of interlocutory order which was appealable to the Court of Appeals (R. pp. 654-660), and likewise filed briefs on the merits subject to the motion to dismiss.

As stated above while the appeal was pending, petitioners applied for certiorari to this Court to review the decision of the Fifth Circuit denying their motion for leave to file for mandamus. (*The Crummer Co. and R. E. Crummer & Co.* v. *Barker*, October Term, 1951, No. 323). This Court denied certiorari on December 11, 1951.

The Court of Appeals on March 3, 1952 heard the appeal in full and allowed full argument from counsel upon the merits of the transfer order as well as upon the motions to dismiss. On May 2, 1952 the Court below entered its order (R. 666) which is now the subject of the present application for certiorari. In its opinion, the Court said at p. 469 of 196 F. 2d:

> "* * * After oral argument and upon full consideration of the proceedings below, this court entered its order denying the motion for leave to file a petition for writ of mandamus. Implicit in this order is the finding that the District Judge did not abuse his discretion.
>
> "Having failed to secure relief in this court by mandamus, the appellants perfected this appeal, again seeking a review of the order of transfer. In response, the appellees filed a motion to dismiss the appeal and that motion is now pending for disposition.

[8]This was in effect a second application to the Court of Appeals for extraordinary relief. See footnote 1 on page 1.

"It is clear that the transfer order, being interlocutory and not falling within one of the exceptions provided by statute[9] is not appealable. * * *"

STATUTES INVOLVED

The pertinent statutory provisions are printed in Appendix "A," infra, pp. 29-30.

ARGUMENT

Petitioners' questions presented (see footnote 2 on p. 2) appear to be broader than their specification of errors to be urged, which are hereinafter set forth. Petitioners claim that the Court of Appeals erred[10] (Pet. p. 16):

1. In sanctioning the transfer order of the District Court, although it was based upon wholly inadequate grounds and constituted an abuse of discretion amounting to a usurpation of power.

2. In dismissing plaintiffs' appeal, or in the alternative, in failing to consider the appeal as an application for extraordinary relief and grant same.

3. In denying plaintiffs any relief whatever.

Summary of Argument

Petitioners seek to complicate this review and to obscure the real and major question for review by this Court, namely, did the Court of Appeals properly dismiss the appeal from the interlocutory transfer order?

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[9]See 28 U.S.C. sec. 1291 and 1292.

[10]The above named specifications of errors to be urged are almost identical with the specification of errors to be urged which were set forth by petitioners upon the prior certiorari proceeding in this Court, *The Crummer Co., et al.* v. *Barker,* October Term, 1951, No. 323, petition for certiorari at p. 7.

In order to relitigate the question of the abuse of judicial discretion by the District Judge and to obtain a second review thereof in this Court, petitioners assert that the Court of Appeals below has not, in the two appellate proceedings granted the petitioners, accorded them a review of Judge Barker's order. This contention is refuted by the opinion of Judge Borah (R. 665) and by the record in this proceeding and in the prior proceeding in this Court.[11]

Point I will show that the Court of Appeals has accorded a review of whether the District Judge abused his judicial discretion under 1404(a) and that the Court below correctly ruled that the appeal from the interlocutory transfer order should be dismissed.

Point II will show that the decisions below do not conflict with *Gulf Oil Corp.* v. *Gilbert*, 300 U.S. 501, and applied proper principles of law in their consideration of Section 1404(a).

Point III will show that the decision of the Court of Appeals is not in conflict with the decision of the Court of Appeals for the District of Columbia in *Wiren* v. *Laws*, 194 F. 2d 873, in connection with controlling legal principles and standards applicable to transfers under Section 1404(a) and the reviewability of such orders.

Point I.

The Decision of the Court of Appeals to Dismiss the Appeal From the Interlocutory Transfer Order Was Right.

Petitioners contend that the decision of the Court below to dismiss the appeal denied them any review of the District Judge's transfer order and therefore held that an erroneous

[11] *Crummer, et al.* v. *Barker*, October Term 1951, No. 323.

transfer order is not reviewable at all. This contention is without merit and does not accord with the decisions of the Fifth Circuit.

The record, as has been previously pointed out (at p. 8, 9), clearly shows that petitioners have had a review of whether the District Judge abused his judicial discretion under 1404(a). The petitioners first sought to vacate the transfer order under Section 1404(a) through mandamus proceedings in the Court of Appeals. Judge Borah, who participated in those proceedings, summarized their scope in these words (196 F. 2d at p. 469):

> "After oral argument and upon full consideration of the proceedings below, this Court entered its order denying the motion for leave to file a petition for mandamus. Implicit in this order is the finding that the District Judge did not abuse his discretion."

Petitioners' application for writ of certiorari to review and reverse the order denying this motion for leave to file was denied by this Court on December 11, 1951.

In according a review of the transfer order via the mandamus route, the Court of Appeals followed its earlier decision in *Atlantic Coast Line* v. *Davis*, 185 F. 2d 766 (C.A. 5, 1949) wherein the Court had ordered issuance of a writ of mandamus to correct an erroneous 1404(a) transfer order.

Petitioners rely heavily in this proceeding upon the case of *Wiren* v. *Laws*, 194 F. 2d 873 (App. D. C. 1951) (Pet. Brief pp. 27-28). The Court in the Wiren case cited with approval, the decision of Fifth Circuit in the Davis case, which held that mandamus would lie to review transfer orders, in order to sustain its own decision to review a transfer order in that manner.[12]

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[12]Footnotes 1 and 3, pp. 874 and 875 of 194 F. 2d.

There can be no doubt therefore that the Fifth Circuit has not ruled that erroneous transfer orders are not reviewable at all, in fact its decisions are recognized to be to the contrary, i.e., that in appropriate cases they can be reviewed by mandamus proceedings.

In view of Judge Borah's opinion and the foregoing facts, there is no merit to the contention that no review of the District Judge's order was accorded the petitioners.[13]

The contention that transfer orders are appealable under the rule of *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949), is not supported by the decisions. It is significant that petitioners admit that all Courts of Appeal which have considered transfer orders under Section 1404(a) have held that such orders are interlocutory and non-appealable.[14] They have ruled that such orders are not final decisions within the meaning of 28 U.S.C. 1291, nor are they the pe of appealable interlocutory orders which are specifically t forth in 28 U.S.C. 1292.

Petitioners also admit that four Courts of Appeal have pecifically rejected the Cohen doctrine as being inapplicable to transfer orders, (Pet. Brief at p. 23):

Ford Motor Co. v. *Ryan*, 182 F. 2d 329, 330 (C.A. 2, 1950);

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[13]Particularly, in view of the fact that the Court allowed full reargument at the appeal hearing on March 3, 1952. See ante at p. 11.

[14]*Jiffy Lubricator Co.* v. *Stewart Warner Corp.*, 177 F. 2d 360 (4 Cir., October 10, 1949); *Magnetic Engineering & Mfg. Co.* v. *Dings Magnetic Separator Co.*, 178 F. 2d 866 (2 Cir., January 4, 1950); *Koons* v. *Kaufman*, 187 F. 2d 1023 (2 Cir., October 6, 1950); *Ford Motor Co.* v. *Ryan*, 182 F. 2d 329 (2 Cir., May 8, 1950); *Paramount Pictures* v. *Rodney*, 186 F. 2d 111 (3 Cir., December 6, 1950); *Shapiro* v. *Bonanza Hotel Co.*, 185 F. 2d 777 (9 Cir., December 14, 1950); *Clinton Foods* v. *U.S.*, 188 F. 2d 289 (4 Cir., April 2, 1951); *Nicol* v. *Koscinski*, 188 F. 2d 537 (6 Cir., April 25, 1951); *Wiren* v. *Laws*, 194 F. 2d 873 (App. D.C. Dec. 27, 1951).

Paramount Pictures v. *Rodney*, 186 F. 2d 111, 112 (C.A. 3, 1950);

Shapiro v. *Bonanza Hotel Co.*, 185 F. 2d 777, 779 (C.A. 9, 1950);

Clinton Foods v. *United States*, 188 F. 2d 289, 292 (C.A. 4, 1951).

In those decisions the Courts of Appeal declared that a transfer order did not represent claims of rights separable from and collateral to rights asserted in the action as a whole and too important to be denied review.

Petitioners contend there has been no consideration of the later Cohen doctrine cases. Four of the Circuit Courts of Appeal reached their conclusion a considerable time after the Cohen case and the later case of *Swift & Co.* v. *Compania Columbiana de Caribe*, 339 U.S. 684 (1950) had been decided. It seems an unwarranted assumption that the counsel involved as well as the Circuit Courts themselves would have overlooked the *Swift* case, if such decision had been applicable to the question of appealability of 1404(a) transfer orders.

This Court has had the *Cohen* and *Swift* cases called to its attention, in connection with the question of whether 1404(a) orders are appealable, in the petition for certiorari in *Ford Motor Co.* v. *Ryan*, 340 U.S. 851, 91 S.Ct. 79, 95 L.Ed. 624 (1950). Certiorari was denied and both the *Swift*

and *Cohen* cases were cited and argued in the Briefs filed in this Court by the petitioner and the respondents.[15]

Petitioners now contend that the recent application of the Cohen doctrine in *Stack* v. *Boyle*, 342 U.S. 1, 96 L.Ed. 7, Adv. Op. (1951), impels the conclusion that transfer orders under 1404(a) are appealable. A brief review of that case will demonstrate it is not applicable here. There was no question of transfer or venue in that case but the vital question presented was whether in criminal cases in the case of non-capital offenses the traditional right to freedom before conviction should be preserved. The denial of a motion to reduce excessive bail was held to be appealable. Therefore, the case presents no similarity in fact or in law to a transfer order under 1404(a).

The most recent case deciding that 1404(a) cases are not appealable, *Wiren* v. *Laws*, 194 F. 2d 873, was argued and decided after the decision in the *Stack* case was rendered, and it would be unwarranted to assume that this decision was overlooked by counsel and the Court in that case.

The *Wiren* case was cited and argued to the Court of Appeals during the course of argument on March 3, 1952 at

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[15]In support of their contention that the Court of Appeals for the Second Circuit had erred in refusing to review upon appeal, a district court transfer order, Petitioners stated in their Brief at page 7: "The present petition insofar as it seeks review of the decision of the Court of Appeals dismissing the appeal to that Court is predicated on the belief that the order of the District Court refusing transfer constituted final disposition of a claimed right which is not an ingredient of the cause of action and does not require consideration with it. *Cohen* v. *Beneficial Loan Corp.* 337 U.S. 541, 546-7 (1949); *Swift & Co.* v. *Compania Caribe* 339 U.S. 684, 688-689 (1950)".

Respondents disposed of this contention in their Brief in Opposition to Petition for Certiorari at pages 12-13 stating: "The petition, page 7, also cited without discussion *Swift & Co.* v. *Compania Caribe* 339 U.S. 684, 688-689 (1950). That case involved an order of the District Court vacating the attachment of a vessel in an admiralty proceeding, and bears no resemblance to the present case."

the appeal hearing by counsel for petitioners. The Court therefore must have considered this case before rendering its decision to dismiss the appeal.

The decisions of all of the courts regarding 1404(a) orders clearly compelled the Fifth Circuit to dismiss the appeal from the interlocutory transfer order and no decision of this Court or of any Court of Appeals is contrary.

Contrary to petitioners' contention, the Court below did not decline to treat the petitioners' appeal in the alternative as a petition for extraordinary relief. They allowed full reargument on appeal. In view of the prior mandamus hearings to review the transfer order and a relatively unchanged record on the subsequent appeal, they properly refused to exercise their discretionary power to grant petitioners' alternative plea and second petition for extraordinary relief.

At no time in this proceeding has the Fifth Circuit ever held that an erroneous transfer order is not reviewable at all and hence this contention of the petitioners must fall. The Court below rightfully dismissed the appeal from the interlocutory transfer order.

Point II.

The Decisions of the District Court and Court of Appeals Were Right. They Are Not in Conflict with Gulf Oil Corp. v. Gilbert, 330 U.S. 501 (1947).

The petitioners urge in their brief that Section 1404(a) represents largely a codification of existing practice and standards under the long applied doctrine of forum non conveniens as enunciated recently in *Gulf Oil Corp.* v. *Gilbert*, 330 U.S. 501, 67 S.Ct. 839, 91 L.Ed. 1055 (1947). They contend that when the Court of Appeals refused to set aside the order of the District Court upon appeal, it repudiated

the forum non conveniens doctrine embodied in Section 1404(a). Therefore, the petitioners claim that the Court decided an important question of federal law which should be settled by this Court, to-wit: the precise applicability, if any, of the *Gulf Oil* case standards to Section 1404(a) transfer motions.[16]

They further argue that had the Gulf standards been applied, no transfer order could have resulted. Essentially, the petitioners' argument that had Gulf Oil standards been applied no transfer order would have resulted, can be reduced to two contentions: (1) that the decision of this Court in *Gulf Oil Corp.* v. *Gilbert*, 330 U.S. 501 (1947), a forum non conveniens case decided prior to the enactment of Section 1404(a) settled the exclusive criteria and standards for transfer under 1404(a) (Pet. Brief p. 20) and (2) that the District Judge in ordering the transfer violated the standards of the *Gulf Oil* case.

(1) The District Judge did not Violate Standards of Gulf Oil Case.

Even if the standards established in the *Gilbert* case should be exclusively applied in the determination of motions under Section 1404(a), the decision of the District Court would not be erroneous. The record before the District Court met the requirements as stated in the *Gulf Oil* case.[17]

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[16]Petitioners made almost this same plea and claim in their former application to this Court. *The Crummer Company, et al.* v. *Barker*, No. 323, October Term 1951, (Pet. p. 7-9).

[17]"Relative ease of access to sources of proof, availability of compulsory process for attendance of unwilling witnesses, cost of obtaining attendance of willing witnesses; possibility of view of premises, if view would be appropriate to action; and all other practical problems that make trial of case easy, expeditious and inexpensive." (p. 508, 330 U.S.).

The argument of the petitioners runs to the weight (Pet. Brief p. 18) which the district judge accorded certain factors and to the conclusions which he reached in attempting to resolve the conflicting facts presented by the motions and affidavits in the record. It is apparent that he accorded consideration to all relevant factors including those set forth in the *Gulf Oil* case.

The petitioners are fundamentally seeking a second review of the decisions below which turns solely upon an analysis of the particular facts involved and where merely the facts are in dispute. The findings of fact made by the District Judge under the discretionary power granted by Section 1404(a) were undisturbed and impliedly approved by the Court of Appeals. In that situation this Court has often held that "a court of law, such as this court is, rather than a court for the correction of errors in fact finding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error." *Graver Tank & Mfg. Co.* v. *Linde Air Prod. Co.*, 336 U.S. 271, 275 (1950); *Graham* v. *Brotherhood of Locomotive Firemen*, 338 U. S. 232, 236, 94 L.Ed. 22 (1949).

Contrary to petitioners' argument, (Pet. Brief p. 18) the District Judge considered the "private interests" of all parties, including The Crummer Company, for his findings show clearly a consideration of their respective domiciles (R. 629-631); the location of their records (R. 639) and their witnesses (R. 640). Petitioners do not claim a lack of consideration of the factor of "relative ease of access to sources of proof" but disagree with the conclusions of fact reached by the trier of fact, the district judge (Petitioners' Brief, p. 8). No disregard of this *Gilbert* case factor is apparent.

In contrast to petitioners' argument (Pet. Brief, p. 9-10), the findings show that the district judge carefully considered the standards of the *Gilbert* case concerning trial witnesses.[18] In regard to witnesses, the district judge noted that the situation was highly speculative for neither side had identified by name or tentative list, witnesses expected to be called at the trial, either willing or unwilling (R. 640). He found that it was likely that many of the witnesses would come from in and about the Tallahassee Division, the locale of two-thirds of the alleged Florida overt acts (R. 640-641)[19] and the Florida Attorney General's affidavit so stated (R. 404).

There can be no doubt that the defendants themselves will be present at the trial in order to testify in their own defense and to present their case. Their absence at that time would be too prejudicial to even be seriously contemplated or considered.

Petitioners did not make any claim below that any taxing unit officials from the Southern District would be unwilling witnesses and that a subpoena would be necessary to obtain their presence at the trial (R. 640). The Gulf Oil standard as to witnesses was met.

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[18](a) Availability of compulsory process for attendance of unwilling witnesses, (b) cost of obtaining attendance of willing witnesses.

[19]The essence of a civil cause of action under the anti-trust laws is injury directly caused by an overt act committed in violation of the anti-trust laws. Right of recovery in civil action for damages resulting from conspiracy in restraint of trade is not based upon the conspiracy itself but upon injuries resulting from the overt acts themselves done pursuant thereto. *Foster & Kleiser Co.* v. *Special Site Sign Co.* (C.C.A. 9, 1936) 85 F. (2d) 742, cert. den. 299 U.S. 613, 57 S.Ct. 315, 81 L.Ed. 452; *Sucklow Borax Mines Consol.* v. *Borax Consol. Ltd.* 81 F. Supp. 301, Aff. 185 F. (2d) 196, cert. den. 340 U.S. 943, 95 L.Ed. 418, 71 S.Ct. 506. Mere charges of conspiracy cannot support a civil action for treble damages. *Tilden* v. *Quaker Oats Co.* (C.C.A. 7, 1924) 1 F. (2d) 160.

Petitioners contend (Pet. Brief p. 18) that the district judge failed to adhere to the Gulf Oil standard that "unless the balance is strongly in favor of the defendant, the plaintiffs' choice of forum should rarely be disturbed." The district judge, though not using the precise words of the *Gilbert* case, found (R. 642):

> "upon examination of all factors in terms of parties and witnesses, in the interest of justice, the record shows that a sufficient weight of factors favoring the transfer has been established to impel the granting of the Motion to Transfer."

The foregoing is essentially a finding of "a strong balance of factors" in favor of the transfer.

(2) District Judge's Power to Transfer under Section 1404(a) is not Limited to Pre-Existing Standards announced under the old Forum Non Conveniens Doctrine.

The enactment by Congress of Section 1404(a) granted the trial courts a greater discretion to transfer cases than they formerly could exercise under the doctrine of forum non conveniens.

Prior to the enactment of Section 1404(a), when a plaintiff selected a highly inconvenient forum as determined by the tests enunciated in the *Gulf Oil* case, he was faced with a possibility that his action would be dismissed under the doctrine of forum non conveniens. The remedy granted by that doctrine was drastic. Such a plaintiff was to be relegated to the uncertainties of again obtaining jurisdiction over the defendants with the possibility that the applicable statute of limitations might have run by the time he did so. Moreover, he was required to undergo the expenses and trouble of beginning his action anew in another forum which, in all probability, was less convenient to him.

By enacting Section 1404(a) of the New Judicial Code, Congress remedied many of the shortcomings arising from application of the doctrine. By authorizing a transfer in lieu of dismissal, plaintiffs were no longer faced with the hardships referred to above. *Amalgamated Association, etc.* v. *Southern Bus Lines, Inc.* (C.C.A. 5, 1949) 172 F. 2d 946, 948. Moreover, the remedy allowing transfer from an inconvenient forum was enlarged to be available to defendants in numerous classes of cases to which the doctrine was theretofore not applicable.[20]

Chief Judge Parker, (one of the advisors to the Committee upon this legislation) speaking for his court in *Jiffy Lubricator* v. *Stewart Warner Corp.* (C.A. 4, 1949) 177 F. 2d 360, 362, said:

> "The notion that 28 U.S.C.A. Section 1404(a) was a mere codification of existing law relating to forum non conveniens is erroneous. It is perfectly clear that the purpose of this section of the Revised Judicial Code was to grant broadly the power of transfer for the convenience of parties and witnesses, in the interest of justice, whether dismissal under the doctrine of forum non conveniens would have been appropriate or not. See Ex parte Collett 337 U.S. 55, 69 S.Ct. 944 * * *."

By these reforms, Congress intended to more nearly equalize the rights of plaintiffs and defendants in the place of trial and when the plaintiff selects a forum which does not meet, in the terms of the statute, "the convenience of parties

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[20]Prior to the enactment of Section 1404(a), dismissal under the doctrine was granted only in actions to which the general venue statutes were applicable and denied in cases such as treble damage suits and action brought under the Federal Employer Liability Act to which special venue statutes were applicable. See *U.S.* v. *National City Lines, Inc.* 334 U.S. 573 (1948) (the first case) *Baltimore & Ohio R. Co.* v. *Kepner* 314 U.S. 44 (1941).

and witnesses, in the interest of justice," the forum Court will transfer the action to a more appropriate forum.[21]

Though the criteria and standards announced in the *Gulf Oil* case may be useful guides in determining whether transfer should be affected under Section 1404(a), they are not exclusive guides. All relevant factors in terms of the "convenience of parties and witnesses in the interest of justice" should be considered in determining whether a proposed transfer should be made and were considered by the District Judge below.

As an afterthought, petitioners urge (Pet. Brief p. 19) that this Court should decide the precise applicability of the *Gulf Oil* case standards to Section 1404(a) transfer motions and set out a guide for the trial courts. The asserted conflict in decisions in the interpretation of Section 1404(a) arises primarily from differences in states of fact and not in the application of principles of law. Congress granted the District Courts considerable discretion under the statute to deal with the varied cases and factual situations. Congress has set forth the standard in Section 1404(a). The Federal Courts are, as stated by Judge Learned Hand,[22] "often faced with indeterminate and indeterminable standards; reasonable notice, reasonable cause, gross negligence, the requisite proof in fraud or criminal prosecution." The application of the provisions of Section 1404(a) by Courts is neither new nor unique in granting to the District Court broad discretion in determining involved factual questions.

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[21]Professor Moore, in his Commentary on the U.S. Judicial Code, distinguishes the old and the new as follows at page 209: "But it should be recalled that Justice Jackson was dealing (in Gulf Oil case) with forum non-conveniens at a time when, if applied, it now results in a transfer. As a consequence, Courts may now properly utilize the doctrine more freely than it was proper to do when dismissal resulted."

[22]*Ford Motor Co.* v. *Ryan* (C.A. 2, 1950) 182 F. 2d 329, 332.

Precise and exclusive standards would indeed destroy much of the discretion given to the trial judges by Section 1404(a) and thereby unreasonably restrict them in dealing with the varied cases presented by various motions to transfer.

The facts in this case were fully considered by Judge Barker and his order, we submit, is not in conflict with any decision of this Court. He did not, as charged by petitioners, (Pet. Brief p. 16), abuse his discretionary power under Section 1404(a).

Point III.

Decision of Court of Appeals Below Is Not in Conflict With Any Decision of the Court of Appeals for the District of Columbia.

Contrary to Petitioners' contention (Pet. Brief, pp. 25-27), the Fifth Circuit in dismissing the appeal from the interlocutory transfer order and in refusing to grant petitioners' second application for extraordinary relief to set aside the transfer order, did not render a decision in conflict with the decision of the Court of Appeals for the District of Columbia in *Wiren* v. *Laws*, 194 F. 2d 873 (1951). This contention is based primarily upon two arguments, i.e., that in the *Wiren* case (1) the Court adhered to the principles of *Gulf Oil Corp.* v. *Gilbert*, supra, and the District Court and Court of Appeals below refused to apply such principles and (2) the Court held that mandamus was the appropriate remedy to review a transfer order and the Fifth Circuit held to the contrary.

A brief review of that case will show that these contentions are not valid. In the *Wiren* case, the plaintiff had previously brought in the Federal Court in New York, a suit against certain defendants. Subsequently she brought suit in

September 1948 in the District of Columbia against the same defendants and alleged that final judgment against her in the New York suit was obtained by fraud and corruption. About a year and a half after the suit had been filed, the trial judge suggested sua sponte the transfer of the cause to New York under Section 1404(a). The District Judge entered an order of transfer on Oct. 25, 1950, more than two years after the filing of the complaint.

The Trial Judge, Judge Laws, treated the petitioners' District of Columbia suit "as comparable to a motion for a new trial on newly discovered evidence" and upon that basis he concluded that the convenience of the *Court* would be best served by transfer of the cause to the forum in which the prior litigation involving these parties had unfolded (194 F. 2d 873 at 875). Unlike the District Judge below in these proceedings,[23] Judge Laws, failed to adhere to the criteria set forth in Section 1404(a) "for the convenience of parties and witnesses, in the interest of justice" and based the transfer on the convenience of the Court.

The Court of Appeals clearly pointed this out in its opinion where it stated at page 875 of 194 F. 2d:

> "Whether a suit is 'comparable to a motion for a new trial of new discovered evidence' is pertinent only to the matter of the jurisdiction of the Court to hear the cause; it is not pertinent to transfer under 1404(a). Transfer vel non should be decided by weighing the plaintiff's privilege of choosing the forum against the inconvenience if any, caused either witnesses or defendants in the chosen forum."

This was the major question upon which the Court's decision was based.

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[23] See discussion at pages 19-22.

The Court, in order to show in a general way what criteria the District Court should have applied to 1404(a) situations, quoted from *Ford Motor Co.* v. *Ryan*,[24] 187 F. 2d 329 (C.A. 2, 1950) and the case of *Gulf Oil Corp.* v. *Gilbert*, *supra*.

Respondents have already pointed out, *ante* pages 19-22, that the District Judge below considered all relevant factors and standards including those stated in the *Gilbert* case. There is no conflict in the cases as to the applicability of the principle of the *Gulf Oil Corp.* case.

In connection with the reviewability of a transfer order, the *Wiren* case held that mandamus and not appeal was the proper form of review. It refused to consider the order of the District Court upon appeal; it did review it upon an application for mandamus. In this case, the petitioners correctly recognized at the outset that, in line with the principles enunciated in the subsequent *Wiren* case, mandamus represented the proper avenue for reviewing Judge Barker's order; they have long since petitioned the Court of Appeals for such writ of mandamus and were long ago denied the writ; and this Court upheld that denial by denying the petition for certiorari from that decision of the Court of Appeals. After losing their application for a writ of mandamus, the petitioners changed their position and asserted that they were entitled to a review by appeal of the transfer order.

Both the *Wiren* case and every decision of a Federal Court of Appeals which has considered the question have consistently held that such a transfer order is not an appealable order under Section 1292, 28 U.S.C. The *Wiren* case is

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[24]Petitioners unsuccessfully contended on the prior proceedings in No. 323, October 1951 Term that the above-cited case was in conflict with the refusal of the Court below to grant mandamus proceedings to set aside the transfer order.

not in conflict with the decision of the Court of Appeals for the Fifth Circuit herein on such point. On the contrary, the two decisions are in absolute accord. The petitioners have had their day in court upon their application for a writ of mandamus. They have no cause of complaint. Their claim that the Court of Appeals did not give adequate consideration of their application for a writ of mandamus (a contention not justified in view of the fact that the Court of Appeals had the application before it for the greater part of a working day, and that this Court refused to set their decision aside on certiorari) certainly does not create a right to another and different remedy and will not extend the scope of Section 1292. The Court of Appeals properly dismissed this appeal.

CONCLUSION

The petition for the issuance of writ of certiorari should be in all respects denied.

October 3, 1952.

Respectfully submitted,

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APPENDIX "A"

1. Title 28 U.S.C., Sec. 1404(a):
   Change of Venue

"For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought."

2. Title 28 U.S.C., Sec. 1254:
   Courts of Appeals; Certiorari; Appeal; Certified Questions

"Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon a petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

(2) By appeal by a party relying on a State statute held by a court of appeals to be invalid as repugnant to the Constitution, treaties or laws of the United States, but such appeal shall preclude review by writ of certiorari at the instance of such appellant, and the review on appeal shall be restricted to the Federal questions presented;

(3) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.

3. Title 28 U.S.C., Sec. 1291:
Final Decisions of District Courts

"The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the District Court for the Territory of Alaska, the United States District Court for the District of the Canal Zone, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. June 25, 1948, c. 646, 62 Stat. 929.

4. Title 28 U.S.C., Sec. 1292:
Interlocutory decisions

"The courts of appeals shall have jurisdiction of appeals from:

(1) Interlocutory orders of the district courts of the United States, the District Court for the Territory of Alaska, the United States District Court for the District of Canal Zone, and the District Court of the Virgin Islands, or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court;

(2) Interlocutory orders appointing receivers, or refusing orders to wind up receiverships or to take steps to accomplish the purposes thereof, such as directing sales or other disposals of property;

(3) Interlocutory decrees of such district courts or the judges thereof determining the rights and liabilities of the parties to admiralty cases in which appeals from final decrees are allowed;

(4) Judgments in civil actions for patent infringement which are final except for accounting. June 25, 1948, c. 646, 62 Stat. 929.

End